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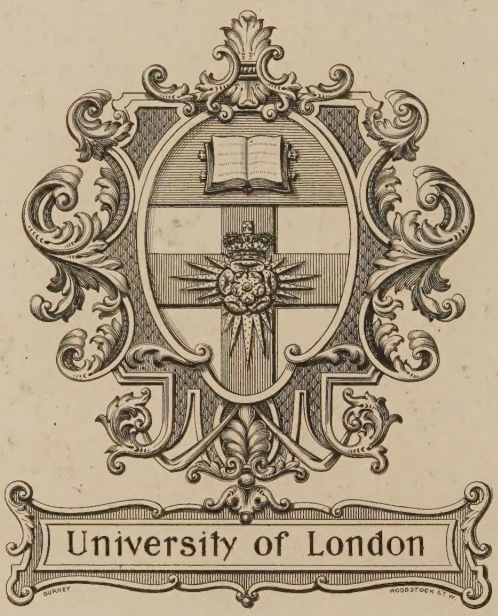

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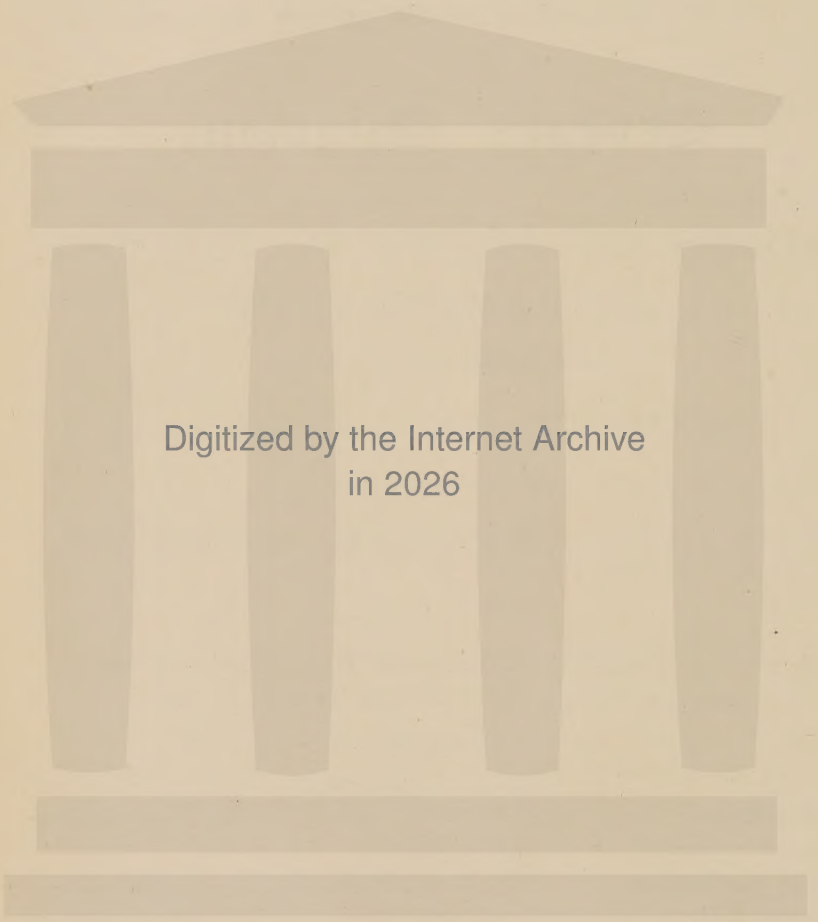

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OF

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1900.

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OF

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1900.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1899. 1900.

[IN THE COURT OF APPEAL.]

C. A.
1899
Oct. 25, 26;
Nov. 4.

THE MORGENGRY AND THE BLACKCOCK.

Admiralty—Collision—Action against Tow and Tug—Decree by Default against Tow—Decree that Plaintiff's Ship and Tug were both to Blame—Division of Loss.

A Norwegian barque, whilst in tow of a tug in the Bristol Channel, came into collision with, and sank, a third vessel. The plaintiffs, owners of the third vessel, brought an action in rem against the owners of the barque and the owners of the tug. The owners of the barque having allowed judgment to go by default, the barque was sold by the marshal under a decree condemning that vessel in the amount of the plaintiffs' damage.

The action proceeded against the tug, and resulted in a decree pronouncing both the plaintiffs' vessel and the tug to blame, and condemning the owners of the tug in a moiety of the plaintiffs' damage. On the question of the division of loss:—

Held, by the Court of Appeal (A. L. Smith and Vaughan Williams L.JJ.), affirming the decision of Bucknill J., that the plaintiffs were entitled to

C. A.
1899
THE MORGENGRY AND THE BLACKCOCK.

the proceeds in court of the barque, in part satisfaction of the whole of their damage under the decree by default against that vessel, and that they were also entitled to a moiety of their damage from the owners of the tug, under the decree of both to blame, the proceeds of the barque, and the moiety due from the owners of the tug, taken together, not exceeding the whole of the plaintiffs' loss.

The Englishman and the Australia, [1894] P. 239, distinguished.

APPEAL by defendants, the owners of the steam-tug *Blackcock*, in an action of damage by collision, from an order of Bucknill J., sitting in Admiralty, directing that the proceeds in court of the barque *Morgengry* should be paid out to the plaintiffs, the owners of the steamship *Mourne*, in part satisfaction of the damage sustained by them.

The question was: whether the defendants, the owners of the *Blackcock*, were entitled to have the proceeds of the *Morgengry*—sold in the same action under a decree by default—applied in reduction of the moiety of the damage payable by them to the plaintiffs under a decree pronouncing both the plaintiffs' vessel and the *Blackcock* to blame.

The material facts were shortly as follows:—

On December 17, 1898, the steamship *Mourne*, from Cardiff to Dublin with coals, and the Norwegian barque *Morgengry*, from Carnarvon to Cardiff, came into collision in the Bristol Channel, the *Morgengry* being at the time in tow of the steam-tug *Blackcock*. The *Mourne* sank, and the *Morgengry* was seriously damaged.

On December 19 the plaintiffs, the Newry and Kilkeel Steamship Company, Limited, owners of the *Mourne*, commenced an action in rem of damage by collision against the owners of the *Morgengry*. On December 23 the writ was amended by adding, as plaintiffs, the master and crew of the *Morgengry* proceeding for their lost effects; and on January 11, 1899, the writ was re-amended by adding, as defendants, the owners of the *Blackcock*. On February 6 the plaintiffs delivered their statement of claim alleging that the collision was caused by the negligent navigation of the tow and of her tug, and charging the *Blackcock*, or the *Morgengry*, with bad look-out, the *Blackcock* and the *Morgengry* with improper starboarding

of their respective helms, and the *Blackcock* with not easing, stopping, or reversing her engines.

The owners of the *Morgengry*, foreigners domiciled abroad, appeared as defendants, but, as they took no further steps by way of defence, their appearance was struck out, and a decree, dated February 27, in the usual form, pronounced in favour of the plaintiffs' claim for damage against the *Morgengry*, subject to a reference, and condemned the *Morgengry* in the amount of the damage and in costs. Under this decree the *Morgengry* was appraised and sold by the marshal, and the net proceeds, 855*l.* 5*s.* 11*d.*, paid into court.

The action proceeded against the *Blackcock*, the owners of which by their defence alleged that their tug was under the direction of the pilot of the *Morgengry*, that the collision was solely caused by the negligent navigation of those in charge of the *Mourne*, and they charged specific acts of negligence, but as the tug had not been in collision and had not sustained any damage, they made no counter-claim.

The case was heard by Bucknill J., assisted by two of the Elder Brethren of the Trinity House, and, on March 24, the Court pronounced both the plaintiffs' steamship *Mourne* and the defendants' tug *Blackcock* to blame, and the decree, in the usual form, condemned the owners of the *Blackcock*, and their bail, in a moiety of the damage proceeded for, but made no order as to costs.

On June 29 the claim of the owners of the *Mourne* was assessed by the registrar and merchants at 4041*l.* 10*s.* 4*d.*, the claims of the master and crew at 104*l.* 19*s.* 10*d.*, and that of the owners of a part cargo of coal (1) at 84*l.* 10*s.*, making together 4231*l.* 0*s.* 2*d.*, or, excluding the value of the coal, 4146*l.* 10*s.* 2*d.*, of which a moiety amounted to 2073*l.* 5*s.* 1*d.* The owners of the *Blackcock* then obtained a decree limiting their liability to 1802*l.*

The plaintiffs, the owners of the *Mourne*, took out a summons for payment out to them of the 855*l.* 5*s.* 11*d.*, proceeds of the *Morgengry*; and the defendants, the owners of the *Blackcock*,

(1) The owners of cargo were not parties to the suit, but the registrar assessed the value of the coals at the request of the plaintiffs.

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opposed it on the ground that these proceeds must be applied in reduction of the moiety of the plaintiffs' damage in which they had been condemned. The summons was adjourned into court and treated, by consent, as an application to decide the question as to the division of loss.

On August 12 Bucknill J. gave judgment, holding that the plaintiffs, the owners of the *Mourne*, were entitled to the proceeds of the *Morgengry* in part satisfaction of the amount of damage, interest, and costs pronounced for under the decree by default, and also to a moiety of their damage from the owners of the *Blackcock* under the decree of both to blame, and that they were entitled to enforce their judgment under both decrees so long as they did not recover more than the total amount of their loss.

Oct. 25, 26. The owners of the *Blackcock* appealed.

Carver, Q.C., and *D. Stephens*, for the appellants (defendants). There is only one action in this case, that by the *Mourne* against both the *Morgengry* and the *Blackcock*; and only one collision, that between the *Mourne* and the *Morgengry*. The result of the decree by default against the *Morgengry*, and of the decree of both to blame between the *Mourne* and the *Blackcock*, is that all three vessels are to blame; but in respect of the damage to the *Mourne*, the two defendants are joint tortfeasors, and, as the *Mourne* is also to blame, the Admiralty rule applies. This rule, which was worked out by the House of Lords in *The Khedive* (1), is stated by Lord Blackburn in *The Margaret* (2) to be, "that if there is blame causing the accident on both sides, they are to divide the loss equally"; therefore, the owners of the *Mourne* cannot recover more than one-half their actual loss; but by the order, now under appeal, the plaintiffs are to be allowed to take the proceeds of the *Morgengry* out of court without giving credit for that sum, so that they will recover more than one-half the amount of their damage.

The decision also conflicts with the rule by which tug and

(1) *Stoomvart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, (1882) 7 App. Cas. 795.

(2) *Cayzer* v. *Carron Co.*, (1884) 9 App. Cas. 873, at p. 881.

tow are regarded as one vessel: see *The Englishman and the Australia* (1), where a tug, whilst towing a vessel, came into collision with a third vessel. All three vessels were found to blame, and the tug and tow were held liable for half the damage of the third vessel. In accordance with that case the *Morgengry* and *Blackcock* must be treated as one vessel, liable for half the damage of the *Mourne*; and, therefore, the owners of the *Mourne* must give credit for the proceeds of the *Morgengry* when claiming a moiety of their loss from the *Blackcock*.

An alternative method would be to deduct the 855*l.* 5*s.* 11*d.*, proceeds of the *Morgengry*, from the total loss of the *Mourne*, and then make the *Blackcock* liable for a moiety of the balance; but, unless in one of these ways the proceeds of the *Morgengry* are taken into account, the owners of the *Mourne* will recover more than half their loss, which, being themselves, by their servants, wrongdoers, they cannot do.

[The following were referred to: *Darley Main Colliery Co.* v. *Mitchell* (2); *Backhouse* v. *Bonomi* (3); *Merryweather* v. *Nixan* (4); *Palmer* v. *Wick, &c., Shipping Co.* (5)]

Lauriston Batten, for the respondents (plaintiffs). The Admiralty rule as to the division of loss is not disputed, but it does not apply to the case of the *Morgengry*, for the owners of the *Morgengry* did not contest their liability, and, therefore, as between them and the plaintiffs, under the decree by default, the *Morgengry* is liable for the whole of the damage sustained by the plaintiffs, namely, 4146*l.* 10*s.* 2*d.*

The owners of the *Blackcock* did contest their liability, and, under the decree of both to blame, they are liable for one-half of the damage sustained by the plaintiffs, namely, 2073*l.* 5*s.* 1*d.*

The result is that, under two separate decrees, against two separate tortfeasors, the plaintiffs are entitled to the whole of their loss from one defendant, and to half that loss from the other; but all that they will actually receive from the *Morgengry* will be the net proceeds in court, 855*l.* 5*s.* 11*d.*, and from the owners of the *Blackcock* the amount to which they

(1) [1894] P. 239.
(2) (1886) 11 App. Cas. 127.
(3) (1861) 9 H. L. C. 503.
(4) (1799) 8 T. R. 186; 16 R. R. 810.
(5) [1894] A. C. 318.

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have limited their liability, namely, 1802*l.*, making together 2657*l.* 5*s.* 11*d.*, a sum far short of the actual loss incurred by the plaintiffs.

The proposition that tug and tow are in all cases to be considered, in respect of a tort, as one vessel is disputed, for the tug may, by independent wrongful acts, be a separate tortfeasor: see the observations of Sir James Hannen in *The Niobe*. (1)

[He was stopped by the Court.]

Carver, Q.C., in reply. The limitation of liability obtained by the owners of the *Blackcock* does not affect the question as to the principle governing the division of loss.

Cur. adv. vult.

Nov. 4. A. L. SMITH L.J. The question is: whether the owners of the tug *Blackcock*, under the circumstances which exist in this case, have any claim to be credited in any and what way with the sum of 855*l.* realized by the sale of the barque *Morgengry*. In the Court below, Bucknill J. held that they have not, and has ordered the 855*l.* to be paid out to the plaintiffs in part satisfaction of their damage of 4146*l.*; and against this order it is that the owners of the tug appeal.

To understand this case it is necessary to bear in mind what judgments have been given and are still standing; for these, in my opinion, play an important part in the determination of this matter. When these and the other facts are understood, much of the complexity which has arisen during the argument of the learned counsel for the appellants, the tug-owners, vanishes.

The material facts are these. The owners of the steamship *Mourne* brought an action in the Admiralty Division against the owners of the barque for the damage occasioned to them by the collision brought about, as they alleged, by the negligent navigation of those on board the barque, which damage we know amounted to 4146*l.* Subsequently the plaintiffs added the owners of the tug as defendants. The owners of the barque upon being served with process, though they at first appeared, did not further contest their liability to the plaintiffs; they filed

(1) (1888) 13 P. D. 55, at p. 60.

no preliminary act, they put in no defence, they set up no cross-claim, and their appearance was struck out for default of filing a preliminary act; and they thereby, as it appears to me, clearly admitted as regards themselves that they were solely to blame for the collision complained of by the plaintiffs.

In these circumstances, upon February 27, 1899, the learned President pronounced in favour of the plaintiffs' claim for damages, subject to a reference to the registrar and merchants to report thereon, and he condemned the barque in the damages and costs, and decreed the barque to be appraised and sold. This decree stands unreversed and unappealed against. The sale took place, and the sum of 855*l.*, which was all the barque realized after payment of expenses, was in due course paid into Court in the plaintiffs' action. If the barque had realized the sum of 4146*l.*, in my opinion the plaintiffs, under their judgment against the owners of the barque, would have been entitled to the whole of that sum, and, if they had been responsible persons, the plaintiffs under their judgment might have recovered that amount from them. As, however, the net value of the barque by no means covered the damage sustained by the plaintiffs by reason of the collision—namely, the 4146*l.*—the plaintiffs proceeded with their action against the owners of the tug, the owners of the barque being entirely left out and taking no part in the matter.

The owners of the tug in the action against them set up by way of defence that the collision was solely caused by the negligent navigation of the steamship *Mourne*. When the action came on for trial the owners of the tug defended it, and Bucknill J., after hearing the evidence, assisted by the Elder Brethren, on March 24, 1899, pronounced that those on board the steamship *Mourne* and those on board the tug had been guilty of negligence as regards the collision, and he condemned the owners of the tug and their bail in a moiety of the damages proceeded for by the owners of the *Mourne*, and referred the same to the registrar and merchants to report the amount.

The amount which has been thus reported was the moiety of the 4146*l.*—namely, 2073*l.* The learned judge found "that there had been a bad look-out on board the tug, and that there

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was also a wilful obstinacy on the part of those on board the tug in not taking sufficient or proper steps to try and avoid the collision, and that they held on keeping their engines full speed ahead and hard-a-starboarding their helm." The learned judge then proceeds to point out what the tug ought to have done, if she was in circumstances of difficulty in consequence of the negligent navigation of the *Mourne*, and that the tug did none of these things. No finding was asked for at the trial on the part of the owners of the tug, as is now in argument suggested for them, that the collision had been brought about by the joint negligence of the tow and tug, and, in the face of the finding of the learned judge that there had been a bad look-out on board the tug, and also wilful obstinacy on the part of those on board the tug, if such a finding had been asked for, it does not seem to me that it would necessarily have been obtained, as contended for on behalf of the tug-owners; at any rate, it was not asked for or obtained.

No controversy arises as to the rule of the Court of Admiralty respecting damages when a collision has occurred by reason of the default of each of the colliding ships. The difference between the Admiralty rule and the common law rule is pointed out in many cases, in none more tersely than by Lord Blackburn in the House of Lords in the case of *The Margaret, Cayzer* v. *Carron Co.* (1) I need not refer further to it, for no dispute arises thereon, and the rule is well known. But the point which is now taken by the owners of the tug, when the plaintiffs ask for the payment out of court of the 855*l.*—paid in under the judgment of February 27 against the owners of the barque—is that this 855*l.* should be credited to them, and that the damages recoverable by the owners of the steamship under their judgment against the tug-owners is 2073*l.*—being half of the 4146*l.*—less 855*l.*, or that if the plaintiffs receive out of court the 855*l.*, this 855*l.* must be given credit for by them against the 2073*l.* payable by the tug-owners, so that the sum payable by them to the plaintiffs is 1218*l.*, and not 2073*l.*; or that, if this be not correct, the 855*l.* should be credited against the actual damage suffered by the owners of the steamship—

(1) 9 App. Cas. 873, at p. 881.

namely, 4146*l.*—which leaves a balance due from the tug-owners to the plaintiffs of 1645*l.*—i.e., 4146*l.* minus 855*l.*, which comes to 3291*l.*, half of which is 1645*l.* 10*s.*, so that this sum, and not 2073*l.*, must be paid by the tug-owners to the plaintiffs, subject to a limitation decree to the amount of 1802*l.* the tug-owners have obtained, which does not affect this point.

Now, in the circumstances of this case, in the face of the two separate and independent judgments in favour of the plaintiffs, one of February 27 against the owners of the barque, and the other of March 24 against the tug-owners, how can the tug-owners maintain that they are entitled to credit for this 855*l.* when called upon to pay under the judgment of March 24 the 2073*l.* adjudged against them? That the plaintiffs are entitled to the 855*l.* for their own use under their judgment of February 27 is clear, and to a great deal more if the barque had sold for more or its owners had been responsible people and able to pay, though it is now said by the tug-owners that the plaintiffs must credit this 855*l.* to them in one or other of the ways above set out. How so? Under the plaintiffs' judgment of March 24 against the tug-owners it is decreed that the tug-owners shall pay to the plaintiffs a moiety of the damages proceeded for. What are they? Why, a moiety of the 4146*l.*, the damages which they had in fact sustained, for it was the 4146*l.* which they proceeded for against the tug-owners, and not 4146*l.* minus 855*l.* This is not a case where the plaintiffs have recovered their whole damages, 4146*l.*, from the owners of the barque, and are then proceeding against the owners of the tug.

These two separate judgments, the one against the owners of the barque and the other against the tug-owners, in my opinion conclude this case; they are clear upon their face, and are unappealed against. But, if it were otherwise, I do not agree with the argument of counsel for the tug-owners that, in the Admiralty Court in the case of a collision by a tow and its tug with a third vessel, the acts of the tug are always held to be the acts of the tow, so that separate damages cannot be awarded against each, and that, as a matter of law, the collision must always be held to be brought about by the joint negligence of

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both tow and tug, if by negligence at all. It may be and is so in many cases, but as a matter of law certainly not in all cases. In the case which it was suggested at the bar covered the present, namely, *The Englishman and the Australia* (1), it will be seen that the learned President, when holding the tow liable for the acts of the tug, expressly found that the tow could and should have restrained, but did not restrain, the speed of the tug, and held, therefore, both tow and tug jointly to blame for the collision.

In the present case there is no such finding; and, indeed, in my opinion, the finding as far as it goes is to the contrary; and moreover, in the case of *The Englishman and the Australia* (1), there were not two separate and distinct judgments standing, as in the present case, against the tow and the tug. It is clear, too, from the judgment of Sir James Hannen in *The Niobe* (2), that a tow is not always responsible for the acts of its tug, though in many cases it is.

If it were open to me in this case now to hold that the negligent acts of the barque and the tug were joint acts of negligence, upon the materials before me I could not do so, for what facts I have lead me to the conclusion that they were not; but in my opinion this is beside the real point I have to consider.

For the reasons above given, in my opinion, the plaintiffs are entitled to the 855*l.* under their judgment of February 27 against the owners of the barque, and also to a moiety of the damages proceeded for under their judgment of March 24 against the owners of the tug—that is, 2073*l.*, though the tug-owners have been able, as before stated, to limit their liability as to this amount to the sum of 1802*l.*

VAUGHAN WILLIAMS L.J. I think that the judgment of Bucknill J. was right. The action, which is an action in the Admiralty Division for damage sustained by the *Mourne* from collision at sea, was originally against the owners of the *Morgengry* alone, but the writ was amended by the addition of the owners of the tug *Blackcock* as defendants. At the time of the collision the *Morgengry* was being towed by the *Blackcock*.

(1) [1894] P. 239. (2) 13 P. D. 55.

The owners of the *Morgengry* appeared in the action, but, as they did not file their preliminary act within the time limited, their appearance was struck out, and the plaintiffs took judgment by default against the *Morgengry* for damages subject to a reference, and the *Morgengry*, which in the collision had been sunk in the mud and damaged, was by the judgment decreed to be appraised and sold. This judgment was given after hearing counsel for the owners of the tug *Blackcock*. The sale of the *Morgengry* yielded a net sum of 855*l.* 5*s.* 11*d.*, which was lodged in Court to the credit of the cause. This is the history of the action so far as it relates to the *Morgengry*.

The other defendants, the owners of the tug *Blackcock*, defended the action and charged that the collision was due to the negligence of the plaintiffs; and at the trial it was adjudged that both the *Mourne*, the plaintiffs' vessel, and the *Blackcock*, the defendants' tug, were to blame; and, as the tug was not damaged, it was decreed that the owners of the *Blackcock* should be condemned in the moiety of the damage, that is, of the damage sustained by the *Mourne*, subject to a reference to assess the damage.

The report on the damage has been made in pursuance, as I understand, of the orders in the respective judgments against the *Morgengry* and the *Blackcock*; and it appears by the report that the whole damage in which the *Morgengry* is condemned amounts to 4231*l.* 0*s.* 2*d.* (1), and that the moiety in respect of which the *Blackcock* is condemned amounts to 2115*l.* 10*s.* 1*d.* These figures have been somewhat altered by matters which do not affect the question I am discussing.

Subsequently to the making of this report the plaintiffs, the owners of the *Mourne*, moved for an order that the 855*l.* 5*s.* 11*d.*, the net sum resulting from the sale of the *Morgengry*, should be paid out to the plaintiffs in part satisfaction of the amount of damage, interest, and costs pronounced for in this action; and the learned judge, Bucknill J., after hearing counsel in court both for the plaintiffs and for the owners of the *Blackcock*, made the order.

(1) This sum includes 84*l.* 10*s.*, the amount at which the part cargo of coal on board the *Mourne* was valued by the registrar.

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Vaughan Williams L.J.

This is the order appealed against by the owners of the *Blackcock*, who contend that, in some shape or other, they are entitled to credit for the 855*l.* against the moiety of the damage in respect of which they have been condemned, either by writing it off the total damage before making the division to arrive at the moiety, or by writing it off the moiety itself. I think the owners of the *Blackcock* are entitled to nothing of the sort. The judgments obtained were no doubt interlocutory, because such judgments were subject to a reference, but the declaration of liability was final, and the liability declared was different as against the several defendants.

I have no doubt that since the amendment adding the owners of the *Blackcock* as defendants the action might be treated as joint or several, and that, having regard to what has happened, the action must now be treated as resulting in several final judgments against the *Morgengry* and the *Blackcock* respectively. The judgments are different: the former has been condemned in the whole damage, the latter in the moiety. There is no reason why the owners of the *Blackcock* should have any credit in respect of moneys paid by the *Morgengry*, at all events till such payments exceed that moiety of the damage for which the *Blackcock* alone is responsible.

In actions of tort at common law in which interlocutory judgments have been signed against some defendants for default such defendants do not get the benefit, as a rule, of the defences of defendants who go to trial and succeed; and, notwithstanding that such defendants who have gone to trial may have succeeded wholly or partially, damages may be assessed against the defaulters. It may be that, if there are two separate judgments for the same tort, and the measure of assessment is the same, a plaintiff cannot proceed to execution against a defendant without giving credit for any amounts he has received from other defendants. But in such a case each defendant is liable for the whole of the damages, and it seems to me that cannot apply where the respective defendants are not liable for the same damages, the one being liable for the whole and the other for half.

It is also to be observed that there is no judgment or finding

that the *Mourne* was to blame as against the *Morgengry*. If the owners of the *Blackcock* wished for such a finding, I think they should have asked for it by their defence.

Appeal dismissed.

Solicitors for appellants, the owners of the *Blackcock*: *Holman, Birdwood & Co.*

Solicitors for respondents, the owners of the *Mourne*: *Thomas Cooper & Co.*

T. L. M.

IN THE GOODS OF JOHN GEORGE CAMPION.

1899
Nov. 6.

Probate—Practice—Administration—Will—Executor—Absence from England —No Citation—Grant to Nominee of Assignees of Residuary Legatee.

A testator died in 1890, leaving a will and codicil appointing executors, who duly proved. One of the executors died shortly afterwards, and in 1891 the other went abroad and had intimated that he had no present intention of returning to England, or of acting further as executor.

The Court, without requiring citation or any formal notice to be served upon the executor, granted administration de bonis non, with the will and codicil annexed, in favour of the nominee of the assignees of the residuary legatee.

MOTION for administration de bonis non, with will and codicil annexed, upon the application of the nominee of the assignees of the residuary legatee under the will of John George Campion.

The testator, by his will dated October 27, 1888, appointed Sydney Barton Eckett and Walter Battersby to be his executors and trustees, and, subject to certain specific legacies, he gave the residue of his estate to the former for his own use and benefit absolutely.

By a codicil executed in 1890, the testator substituted T. G. Taylor for S. B. Eckett as executor and trustee.

The testator died on March 18, 1890. His executors proved the will and codicil in October, 1890; and Battersby died in June, 1891.

About the end of 1891 Taylor, the other executor, went

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abroad, and had intimated that he had no present intention of returning to England or of acting further as executor.

The estate consisted almost entirely of reversionary interests under the wills of the testator's grandfather and mother, expectant on the death of his father, Frank Campion. The latter died on May 29, 1898; and thereupon a sum of 15,292*l.* fell into the residue.

All Eckett's interest therein was assigned by him to the Lancashire and Yorkshire Reversionary Interest Company, Limited, by an indenture dated January 29, 1895; and by a deed-poll, dated May 11, 1899, Eckett renounced all right to administration and consented to a grant being made to the company.

By a resolution of the directors of the company, Herbert Kidson, their secretary, was nominated to apply on their behalf for letters of administration de bonis non with the will and codicil of John George Campion annexed. This was the application now before the Court.

Priestley moved for the grant to Mr. Kidson.

GORELL BARNES J. directed letters of administration, with the will and codicil annexed, to be issued in favour of the applicant. (1)

Solicitors: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester.*

(1) See *In the Goods of Collier*, (1862) 2 Sw. & Tr. 444, where the Court (Sir C. Cresswell) made a limited grant to the personal representative of a legatee (the executor, who had proved, being out of the jurisdiction), though in 38 Geo. 3, c. 87 (Simeon's Act), mention is made only of a legatee, creditor, or next of kin. The form of grant, which, under that statute, was limited to exhibiting a bill in equity, was extended, by the Court of Probate Amendment Act, 1858 (21 & 22 Vict. c. 95), s. 18, to "all executors and administrators residing out of the jurisdiction . . . . whether it be or be not intended to institute proceedings in the Court of Chancery . . . .": see also Williams on Executors, 9th ed. 1893, vol. i. 435, 437, and Powles & Oakley, 181.

H. D. G.

In the Goods of AMBROSE HORTON THACKER.
In the Goods of LOUISA THACKER.

1899
Nov. 6.

Probate—Practice—Administration—Renunciation—Retractation—Administration de bonis non—Joint Grant to three Persons.

In 1896 A. H. T. died bankrupt and intestate, leaving a widow, who was his second wife, and six children surviving. His estate was in the hands of an official receiver in bankruptcy. The widow and children duly renounced all rights to administration, and the official receiver took the grant to A. H. T.'s estate, and also a grant de bonis non to the estate of A. H. T.'s first wife.

In 1899 the administrator, having paid all the debts, desired to be relieved of his office, and, with his concurrence, the Court (Gorell Barnes J.) permitted the widow and children to retract their renunciations; revoked the letters of administration; and made a joint grant to the widow and two of the children, in respect of that portion of A. H. T.'s estate remaining unadministered, thus giving them the right, as of course, to take administration de bonis non in the estate of A. H. T.'s first wife.

Motion for leave to retract renunciations to administration; for revocation of outstanding grants; and for fresh grants de bonis non jointly to three persons who had previously renounced.

Ambrose Horton Thacker, who had been bankrupt in 1887, and some time after obtained his discharge, again became bankrupt, and died on September 1, 1896, intestate.

He left five children by his first wife and one by his second wife, who survived him.

On July 24, 1897, letters of administration to his estate were granted to Arthur Stewart Maples, official receiver of the Lincoln County Court, on renunciations duly signed by or on behalf of the widow and children.

Louisa Thacker, the first wife of Ambrose Horton Thacker, died on October 20, 1887; and administration in respect of her estate was granted on December 10, 1890, to the receiver in the first bankruptcy.

On August 9, 1892, this grant was revoked, and a fresh grant was made to Ambrose Horton Thacker, as her husband; and on August 24, 1897, letters of administration de bonis non were

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THACKER, IN THE GOODS OF.

granted to Arthur Stewart Maples, the receiver in the husband's second bankruptcy.

Mr. Maples collected an annual income due and payable to the representatives of Louisa Thacker's estate, and he had thereout not only paid all the debts but had a substantial sum in hand for distribution. He now desired to be released, and was no longer willing to collect the income or to act in the matter.

Alice Harriett Thacker, the widow, and two of the six children of Ambrose Horton Thacker, now moved to revoke the grant with Mr. Maples' concurrence, and asked leave to retract the renunciations formerly filed by or on behalf of themselves and all the other children; and applied for a joint grant to be made to themselves.

Priestley, in support of the application. The widow and children retracted under the belief that the debts would swallow up the estate. They now desire a joint grant, so as to formulate a scheme of trust for the ultimate benefit of all the children, three of whom are still under twenty-one.

GORELL BARNES J. I see no reason why the joint grant should not go. I understand, however, that it will be sufficient to revoke the grants, and to make a fresh grant to Ambrose Horton Thacker's estate only. As his representatives, the applicants will then be entitled, as a matter of course, to represent the first wife's estate.

Solicitors: *Hicks & Son, for H. E. & R. Mason, Great Grimsby.*

H. D. G.

GILES *v.* GILES.

1899
Nov. 13.

Divorce—Practice—Divorce (Additional) Rules, 1875, *r.* 196—*Rules of Supreme Court, Order* XIII., *r.* 1—*Respondent a Person of Unsound Mind—No Appearance to Citation—Appointing Guardian ad litem—Obligation upon Petitioner to apply.*

Where a respondent, in a suit for dissolution of marriage, is a person of unsound mind not so found by inquisition, it is incumbent upon the petitioner, even though suing in formâ pauperis, to apply for an order that some proper person be assigned guardian of the respondent.

THIS was a petition in formâ pauperis by the wife, Annie Giles, for dissolution of her marriage with George Giles on the grounds of his adultery and cruelty.

The respondent was a person of unsound mind not so found by inquisition. He was duly served by the petitioner's solicitor at the Berkshire Lunatic Asylum, near Wallingford, on October 5, 1899, in the presence of the medical superintendent and of the head attendant, under whose personal charge he was and had been since his admission to the asylum on July 29, 1895. He had previously been confined in the Hants County Asylum at Fareham from November 8, 1894.

It appeared, from the statement of counsel for the petitioner, that her solicitors had approached the official solicitor with a view to his acting as guardian ad litem for the respondent, but that, as the petitioner was not in a position to guarantee the costs of the official solicitor, nothing further was done in that direction.

When application was made, under rule 206, by the petitioner's solicitors for the certificate of the registrar that the proceedings in the cause were correct and the pleadings in order, the following note was made, which counsel read to the Court: "The respondent is a person of unsound mind not so found by inquisition. He is also a pauper. No application has been made to assign a guardian ad litem to the respondent, and the petitioner submits that, so far as she is concerned, this

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is not necessary, and that the action may be set down for trial without such guardian being appointed."

The petitioner having given evidence proving repeated acts of cruelty by the respondent in and prior to June, 1891, when she finally left him, and corroborative evidence of the cruelty having been given, as well as evidence of the respondent's adultery in 1893 and 1894, and of his identity, Gorell Barnes J. intimated that, in his opinion, the case had been proved.

Cecil Walsh, for the petitioner, formally asked for a decree nisi, and submitted that rule 196 of the Divorce Court Rules was permissive only, and that a petitioner, especially when suing in formâ pauperis, was under no obligation to apply for the appointment of a guardian ad litem. The practice in divorce was not governed by the Judicature Acts and Rules. [He cited passages from the judgment of Lord Chelmsford in *Mordaunt* v. *Moncrieffe* (1) as shewing that such a case as this had not been provided for by the Legislature.]

GORELL BARNES J. The Divorce Court Rules are not exhaustive. In other suits, where no appearance has been entered on behalf of a defendant who is a person of unsound mind, it is made incumbent on a plaintiff to apply for an order that some proper person be assigned guardian of such defendant: Rules of Supreme Court, Order XIII., r. 1. We ought to follow that practice in this Division. The case must stand over for the official solicitor to be communicated with, and, if necessary, brought before me in chambers.

Solicitors: *Lovell, Son, & Pitfield, for J. Gorden Walsh, Oxford.*

(1) (1874) L. R. 2 H. L., Sc. 374, at pp. 384–87.

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1899
Nov. 8.

Husband and Wife — Separation Order — Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 7—*Rescinding Order— "Fresh Evidence"—Definition.*

"Fresh evidence," within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, to confer jurisdiction to rescind a separation order previously made under s. 4, must be such as would afford ground for a new trial or rehearing in any other class of case. It must be evidence which could not reasonably have been made available at the date of the order, or it must relate to something which has happened since the date of the order, and which affords ground for revision within the terms of the Act under which the order was made.

APPEAL from justices of the borough of Henley-on-Thames.

On June 15, 1899, Mary Anne Johnson, the appellant, obtained an order, under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, against her husband, Charles Edmund Johnson, the respondent, whereby it was adjudged that she should be no longer bound to cohabit with him, and that he should pay to her the weekly sum of 12*s.* 6*d.* The grounds of complaint were desertion, wilful neglect to provide reasonable maintenance for her and her infant child, and by such neglect causing her to leave and live separately and apart from him.

Nothing was paid, and steps were being taken with a view to enforcing the order, when a summons was taken out by the respondent to rescind or vary the same.

On August 17, 1899, this summons came before the borough bench at Henley, when, upon cause having been shewn upon "fresh evidence" to the satisfaction of the Court, the order was discharged.

The solicitor for the wife took objection to the evidence then given, upon the ground that it was not "fresh evidence" within the meaning of s. 7 of the Act of 1895 (1), inasmuch as the

(1) The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7, is as follows :—

"A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district,

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evidence might have been given, either on the occasion when the first order was made, or upon an adjournment, which was offered at the time but refused.

The magistrates, acting upon the advice of their clerk, appeared to have received the evidence of the husband and his witnesses upon the ground that any evidence, not given or tendered at the time the former order was made, must be taken to be "fresh evidence" within the meaning of s. 7 of the Act.

The wife now appealed, and asked that the order of August 17 should be set aside or varied, and that the former order should be restored.

Lynch, for the appellant.

Clarke Hall, for the respondent, referred to the affidavit of a doctor, who had given a certificate upon the occasion of the first hearing, and which shewed the respondent to have been at that time in such a state that he was not expected to live, and was quite incapable of giving evidence or of personally instructing his solicitor.

Lynch, in reply, read an affidavit of his solicitor client, stating that one of the witnesses called for the respondent on August 17 was actually in Court during the proceedings on June 15.

THE PRESIDENT (SIR F. H. JEUNE). The question raised in this case is of general interest, but, to my mind, absolutely free from doubt. The Summary Jurisdiction (Married Women)

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in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shewn upon fresh evidence to the satisfaction of the Court, at any time alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

Act, 1895, s. 7, provides that a court of summary jurisdiction, acting as therein specified, may, upon fresh evidence, alter, vary, or discharge an order previously made. But it is necessary that magistrates should clearly understand what "fresh evidence" means, though, in my view, there is no real doubt about it. It means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading res noviter ad notitiam perventa. It is altogether a mistake to suppose that "fresh evidence," within the meaning of the Act of 1895, means or includes evidence which could have been called, but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance. I have no hesitation in saying that to the words "fresh evidence" in s. 7 must be assigned the limited meaning and scope which I have indicated. Applying that definition to the present case, the magistrates were mistaken in accepting the evidence at the second hearing, as they did, simply because it was evidence which had not been given before. They were misinformed or misadvised by their clerk as to the definition of the words "fresh evidence." I think, however, by the light of the doctor's affidavit now before us, that the evidence, or the greater part of the evidence, brought forward at the second hearing was "fresh evidence" within the meaning of the Act; because the doctor proves not only that the respondent was not able to give evidence, which, from what we have heard, must have been obvious to anybody then present in Court, but also that he was in such a condition as not to be able to instruct his solicitor or to tell him the names of two or three witnesses who were afterwards discovered and who, when called at the second hearing,

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gave evidence of a material kind on his behalf. The magistrates were right in receiving that evidence at the second hearing, but wrong in their reason for receiving it. Now comes the question, What are we to do? There has been, to my mind, a miscarriage of justice, perhaps through a mistake on both sides. There ought to have been an adjournment of the first hearing. That was not asked for, we are told, because the doctor and solicitor of the respondent thought their client and patient was dying. But it exposes the other side to great hardship if, an adjournment having been offered and refused, the evidence of the respondent is sought to be put forward on a subsequent occasion. A similar remark applies to what seems to have happened on the second occasion when the case was before the magistrates. The fresh evidence was tendered, but the wife's solicitor did not ask for an adjournment, on the ground, which he was right about, that the magistrates had no jurisdiction to hear that summons simply because the evidence then given had not been tendered before. He cannot be blamed for the position he took up, inasmuch as it was put forward against him, as a matter of right, that the other side could call any evidence not adduced at the hearing of the first summons. He was justified in standing on his rights. But, in the result, we are landed in what is very like a miscarriage of justice: one bench hears only one side and decides in one way; another bench subsequently hears only the other side and decides the other way. I am, under these circumstances, quite unable to say with any certainty which decision was right; and I do not see how justice can be done except by sending the case back to the magistrates to be reheard in its entirety, and to be decided by them upon the complete facts. The respondent must pay the costs thrown away below and the costs of this appeal.

GORELL BARNES J. I should not desire to add anything but for the reason that I think it ought to be clearly and distinctly understood, in courts of summary jurisdiction throughout the country, what the view of this Court is as to the meaning to be attached to the words "fresh evidence" in s. 7 of the Sum-

mary Jurisdiction (Married Women) Act, 1895. In my opinion those words only relate to such "fresh evidence" as, according to well-known rules, would be admitted as ground for a new trial in an ordinary case, or to the discovery of fresh facts or circumstances which have arisen since the hearing, and which may be not unlikely to be met with in this class of cases: such, for example, as material alteration in means, adultery on the part of a former complainant, and so on. Confined in that way, this Act should be interpreted and understood. The magistrates who heard this case were clearly wrong in the way they read the particular section in question on the advice of their clerk. They seem to have acted upon the view that, because certain witnesses were not called at the hearing of the first summons, they were entitled to accept and consider the testimony of those witnesses as "fresh evidence" within the meaning of s. 7. The respondent's solicitor, owing to the state of his client's health, which was known to both sides and to the magistrates at the time of the hearing of the first summons, was not able to adduce evidence which his client and material witnesses on his behalf could have given. That, when brought forward on the second summons, constituted "fresh evidence" owing to the peculiar circumstances of this case. The only way for us to do justice in this instance is to send the case down for rehearing de novo. The husband must pay the costs, including the costs of this motion.

Solicitor for appellant: *J. T. Campion, Henley-on-Thames.*

Solicitors for respondent: *Webster & Webster, for Robert Simmons, Caversham.*

H. D. G.

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Nov. 15.

[IN THE COURT OF APPEAL.]

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Admiralty — Limitation of Liability — Exemption from Registry — "Tons Burden" — "Register Tonnage" — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-s.* 1; *s.* 503, *sub-s.* 2 (*a*).

By s. 3, sub-s. 1, of the Merchant Shipping Act, 1894, ships not exceeding 15 "tons burden" employed solely in navigation on the rivers or coasts of the United Kingdom are exempted from registry. By s. 503, sub-s. 2 (*a*), the owners of a steamship shall not, where, without their actual fault or privity, any loss or damage is caused to any other vessel, by reason of the improper navigation of their steamship, be liable to damages beyond 8*l.* for each ton of the "gross tonnage" of the steamship:—

Held, by the Court of Appeal (A. L. Smith, Collins, and Vaughan Williams L.JJ.), affirming the decision of Gorell Barnes J., [1899] P. 45, that, under s. 3, a small tug—solely employed in the manner mentioned in the section—of the "gross tonnage," if measured in accordance with the Act, of 35·99 tons, was exempted from registry as the words "tons burden" referred to the net tonnage, and, therefore, under the rules laid down in the Act, involved the deduction from her "gross tonnage" of the allowances for engine-room and crew space, which reduced her tonnage to less than 15 "tons burden."

Secondly, that, as the vessel was properly exempted from registry, her owners were entitled, under s. 503, to limit their liability to 8*l.* for each ton of her gross tonnage ascertained by measuring her in accordance with the Act.

Appeal by defendants, the owners of the *Glanmire*, against the decision of Gorell Barnes J., holding that the plaintiffs, the mayor, aldermen, and burgesses of the city of Bristol, owners of the *Brunel*, were entitled to a decree of limitation of liability. (1)

The question turned on the meaning of the words "not exceeding fifteen tons burden" in s. 3, sub-s. 1, of the Merchant Shipping Act, 1894. (2)

(1) Reported [1899] P. 45.

(2) 57 & 58 Vict. c. 60, s. 3: "The following ships are exempted from registry under this Act:—

"(1.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom. . . ."

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The material facts were shortly as follows:—

On October 27, 1897, a collision occurred in the river Avon between the steam-tugs *Brunel* and *Iris*. The *Iris* was at the time towing the steamship *Glanmire*, and, the tow-rope having been cast off, the steamship took the ground and thereby sustained damage. The owners of the *Brunel* settled with the owners of the *Iris* in respect of the damage to that tug; but, on March 11, 1898, the owners of the *Glanmire* commenced an action against the owners of the *Brunel* for the damage sustained. The owners of the *Brunel* admitted liability, and, by consent, the reference to assess the amount of the damage, which was estimated at 1200*l.*, was deferred, pending proceedings by the owners of the *Brunel* to obtain a decree of limitation of liability. Accordingly, on July 18, 1898, the owners of the *Brunel* commenced an action against the owners of the *Glanmire*, alleging that the collision occurred without their actual fault or privity, and without loss of life or personal injury, and offering to pay into court, with interest at 4 per cent. from the date of the collision, the sum of 234*l.* 1*s.* 8*d.*, being 8*l.* per ton on 29·96 tons—that is, on the alleged gross tonnage of the *Brunel* without deduction on account of engine-room, but less the crew space.

The *Brunel* is a small unregistered steel screw steam-tug, solely employed in navigation on the river Avon and such part of the Bristol Channel as is situate within the port of Bristol. She is 64·4 feet in length, 12·8 feet in breadth, and 7·6 feet in depth. She is divided into four compartments by bulkheads; the forward compartment is used for the crew, the second as a water-tank, the third for the machinery, and the fourth as a store-room. If measured under class 2, in accordance with rule 1 of the second schedule to the Merchant Shipping Act, 1894, her gross tonnage is 35·99 tons. Her propelling-power space measured in accordance with rule 3 of the same schedule—that is, making an allowance of one and three-quarter times the actual boiler and engine space (17·8 tons)—amounts to 31·15 tons, and the allowance for crew space to 6·73 tons. Deducting these two quantities from the gross tonnage in order to ascertain the register

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tonnage, the result is a minus quantity, so that the tonnage of the vessel for registration purposes is nil; but, according to the affidavit filed by the defendants, if measured, apart from these rules, her cubical contents are 3566·28 feet, and, reckoning one ton as equivalent to 35 cubic feet of water, her displacement is 101·89 tons. Deducting 45·35 tons for freeboard and stability, the actual carrying capacity of the *Brunel*, in a safe and seaworthy condition, is 56·54 tons.

At the hearing on November 14 it was admitted, on behalf of the plaintiffs, that the *Brunel* could carry more than 15 tons weight in her cargo spaces, and have a proper freeboard; but it was contended: First, that the *Brunel* was exempted from registry under s. 3 of the Merchant Shipping Act, 1894, as she was employed solely in the manner mentioned in that section; and, if measured in accordance with the Act, she did not exceed 15 tons burden, the words "tons burden" referring to the carrying capacity of the vessel ascertained by measurement in the way detailed in the second schedule of the Act, and, in so measuring her, the space occupied by the propelling power and the crew space would be deducted from the gross tonnage. Secondly, that the *Brunel*, being properly exempted from registry, was a British ship, the owners of which were entitled to limit their liability under s. 503 (1) to an amount calculated on the tonnage of the vessel ascertained by measure-

(1) 57 & 58 Vict. c. 60, s. 503: "(1.) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say, ...

"(*d*) Where any loss or damage is caused to any other vessel; or to any goods, merchandise, or other things, whatsoever on board any other vessel, by reason of the improper navigation of the ship—

be liable to damages beyond the following amounts; that is to say, ...

"(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

"(2.) For the purposes of this section—

"(*a*) The tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room. . . .

"Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled (Sched. VI.) to this Act with regard thereto."

ment in the way prescribed by the Act; but it was admitted in the course of the argument that the plaintiffs—not being, at the time of the collision, in possession of the certificate required by that section shewing that the regulations set out in Sched. VI. of the Act had been complied with—could not, when limiting their liability, deduct the crew space from the gross tonnage of the vessel ascertained by measurement.

On the other hand it was contended, on behalf of the defendants, first, that "tons burden" in s. 3 of the Act of 1894 means actual carrying capacity; and, as the *Brunel* could carry more than 15 tons weight in her cargo spaces and yet have a proper freeboard, she was not exempted from registry under that section. Secondly, that, not being exempted from registry, and not having, in fact, been registered, the effect of ss. 2, 72, and 508 of the Act was to prevent her being recognised as a British ship, the owners of which could limit their liability under s. 503 of the same Act.

On December 7 Gorell Barnes J. gave judgment, reviewing the legislation relating to the registration of British vessels prior to the Act of 1894, and holding that the words "burden" or "tons burden" have been used with a meaning which was the same as that of the tonnage of a vessel ascertained in the manner directed by the Acts for the time being in force—that is to say the registered tonnage—and that the words in s. 3 of the Act of 1894 "were used in reference to the tonnage of a vessel measured in accordance with the provisions of the Act." After pointing out "that the meaning placed upon the words by the defendants would give rise to great difficulty in fixing the exact burden of a vessel," as "the quantity which a vessel can carry depends in part on the season of the year and on other variable circumstances, whereas the measurements give definite results," the learned judge found "that the *Brunel* did not exceed 15 tons burden within the meaning of s. 3 of the Act of 1894," and as "the combined effect of ss. 72, 77, 503, and 508 was to entitle the owners of a British vessel—which is exempted from registry under s. 3, and which has not, therefore, been registered, nor had her tonnage ascertained for the purpose of registry—to

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limit their liability by an amount calculated upon the vessel's tonnage, ascertained by measuring her according to the Act," the learned judge pronounced that the owners of the *Brunel* were answerable in damages to an amount not exceeding 287*l.* 18*s.* 4*d.*, being at the rate of 8*l.* per ton on 35·99 tons, the crew space not being deducted in the absence of the certificate required by the Act.

1899. Nov. 15. The defendants, the owners of the *Glanmire*, appealed, but counsel on their behalf abandoned the argument that "tons burden" in s. 3 of the Act of 1894 means actual carrying capacity independent of the measurements under the Act.

Joseph Walton, Q.C., and *Aspinall, Q.C.*, for the appellants (defendants). Assuming that the words "tons burden" have reference to measurements under the Act of 1894, there is no ground for the view taken by the learned judge in the Court below that these words in s. 3, sub-s. 1, mean "net register tonnage." The Legislature would hardly use the word "burden" in that section if it were intended thereby to indicate the same thing as register tonnage with deductions; and an examination of the use of the word in other sections of the Act of 1894 leads to the conclusion that the word means the tonnage capacity of the vessel under the tonnage deck without deductions.

The group of sections in the Act in question dealing with the "measurement of ship and tonnage" begins with s. 77. By sub-s. 1 the tonnage of every ship to be registered is to be ascertained by rule 1 in the second schedule to the Act. Sub-s. 1 of that rule gives the mode of ascertaining the length of the ship. By sub-s. 2 the transverse area is found, and under sub-s. 3 the mode is set out of multiplying the quantities so ascertained in order to get the cubical contents. The result is the "tonnage" under the tonnage deck. This is what is intended by s. 3, sub-s. 1, to be the "burden" of the ship, for, by sub-s. 3 of s. 77, the allowance under s. 78, for engine-room space, and the deduction, under s. 79, for crew space, are to be made from the tonnage of the ship "for the purpose of ascer-

taining the register tonnage"; but they must by sub-s. 4 be "included in the measurement of her tonnage" ascertained under rule 1, the "register" tonnage being her net tonnage after the allowances and deductions have been made. This view is strengthened by reference to the terms employed in the "particulars of tonnage" required to be set out in a bill of sale under Form A in the first schedule to the Act.

The consequences of taking the net register tonnage as the "burden" of the vessel are startling, and cannot have been intended by the Legislature. In the case of the *Brunel* her gross tonnage is 35·99 tons, but the allowance for propelling power space under rule 3 of the second schedule is one and three-quarter times the actual measurement (17·8 tons)—that is, 31·15 tons. This, when added to 6·73 tons, the allowance for crew space, exceeds her gross tonnage and leaves a minus quantity. In the case of excursion steamers not built to carry cargo, but having the under-deck space occupied by very powerful engines, the result would be that s. 92—which was enacted for the protection of life and property at sea—could not be enforced. By that section a British home-trade passenger ship of "one hundred tons burden" must under a penalty of 50*l.* have a certificated mate, as well as a certificated master, but if the word "burden" is to be construed as referring to the net register tonnage, vessels capable of carrying a large number of passengers would owing to the allowance for propelling power work out at less than 100 tons, and the object of the section would thereby be frustrated. So under s. 622, sub-s. 2, a penalty of 5*l.* for every 50 tons "burden" is incurred by the master of a ship navigating his vessel in a district where pilotage is compulsory, but if the word "burden" is to be taken to mean "net register," and the calculation of the tonnage resulted in a minus quantity, the section would be rendered nugatory. The same reasoning would apply to s. 116 as to the enforcement of a similar fine in the case of a master of a vessel exceeding 80 tons burden not making an agreement with his crew. The result is that as the tonnage or "burden" of the *Brunel*, ascertained by measurement, exceeded 15 tons, she required to be registered. Not being registered, she cannot be

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recognised as a British ship, and her owners are, therefore, debarred under s. 72 from claiming the privilege of limitation of liability.

[*The Andalusian* (1) was referred to.]

Robson, Q.C., and *Lauriston Batten*, for the respondents (plaintiffs). The learned judge in the Court below in his judgment points out that the words "burden" and "tonnage" have been treated throughout the legislation on this subject as having the same meaning, and that in 1835, when, under 5 & 6 Will. 4, c. 56, an elaborate mode of measurement was introduced in order to ascertain the "tonnage" of vessels, the cubical contents of the engine-room were, in the case of steamers, to be deducted. By s. 3 (2) it was enacted that "the tonnage or burthen" so ascertained by measurement should be deemed to be the "tonnage or burthen" of the ship for the purposes of the Act, the result being that "burden" means "tonnage," and "tonnage" means the capacity of the ship for carrying cargo as ascertained by measurement in the way prescribed by the Act, or, in other words, burden means the net register tonnage.

Under the Act of 1894 the method to be adopted in order to ascertain the register tonnage of a steamship is set out in s. 78. The space occupied by the propelling power is to be calculated and deducted from the "gross tonnage," and after deducting, under s. 79, the crew space, the result is the "tonnage" of the ship to be registered—that is, the net register tonnage—and under s. 77 the tonnage so ascertained by the rules applies whether the ship is about to be registered or not.

The alleged consequences of this interpretation of the Act, when applied to the enforcement of penalties for not carrying a certificated mate on a passenger steamer of some size but small register tonnage, may be met by drawing the inference that the Legislature did not think it necessary that coasting steamers of small net tonnage should carry a certificated mate besides the master. So, again, it may be that the word "burden" is used in a different sense in the sections of the Act relating to pilotage, and, as regards the similar point attempted

(1) (1878) 3 P. D. 182. (2) Set out [1899] P. 52.

to be made in respect of the engagement of seamen, it is clear that the words "of less than 80 tons registered tonnage" in s. 113 mean net tonnage whatever the consequences may be; but these points are beside the present question, which is solely whether the *Brunel*, though not registered, is a recognised British ship, the owners of which are entitled, in respect of limitation of liability, to the protection of s. 503. It is submitted that her owners are so entitled on the ground that this vessel is exempted from registry under s. 3 of the Act by reason of her net tonnage or "burden" not exceeding 15 tons.

A. L. SMITH L.J. The question is, What is the meaning of the words "not exceeding 15 tons burden" in s. 3, sub-s. 1, of the Merchant Shipping Act, 1894? Do they mean not exceeding a gross tonnage of 15 tons burden, or do they mean not exceeding a registered tonnage of 15 tons burden? Because it is conceded that, if the meaning of this section is "not exceeding 15 registered tons burden," this tug did not exceed that tonnage, and was exempt from registry.

Upon an ordinary computation, this tug had a gross tonnage of 35·99 tons—very nearly 36 tons; when, however, you deduct 31 tons odd as the proper allowance for propelling power, and 6 tons odd for crew space, the allowances come to more than the quantities, which have to be added together for the purpose of making out the gross tonnage, so that the registered tonnage is nil, and, therefore, certainly does not exceed 15 tons.

In the Court below it was argued that the meaning of tons burden in this section is "the carrying capacity of the ship," and that argument was dealt with by Gorell Barnes J. in an elaborate and exhaustive judgment, in which he went into the history of how the word "burden" came into play. That argument is now abandoned, and counsel for the appellants contend that though the word "burden" does not mean "carrying capacity," it means "gross tonnage." I know that they do not like their argument being put in that way, but it is what it comes to, because it is the gross tonnage before the authorized deductions for engine-room space, &c., are made therefrom that they insist upon. I ask myself what foundation they have for

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saying that "tons burden" means gross tonnage. The only reason that they can possibly give is that the word "tonnage" in rule 3 in the schedule to the Act means the addition of all the parts which are to be added without the deductions which are to be allowed in the case of a steamship. I cannot so read the rule, because it is only reading part of it. In my opinion, tonnage, in rules 1 and 2 of the schedule, means gross tonnage less deductions—that is, registered or net tonnage.

I wish also to point out that the words "tons burden" which we have to construe are in the group of sections in Part I. of this Act, which has relation to the registration of ships, and it seems to me to throw no light upon the words in one group of sections to call attention to words which are to be found in another part of the Act which has reference to something entirely different to the first part of the Act. This first part with which we have to deal to day has reference to the question of the registration, and I should also say the non-registration of ships, and the words which were relied upon in the sections to which counsel for the appellants called our attention, namely, some words of "tonnage" and "tons burden" in different groups of sections, relating to the engagement of seamen, and to other matters, may well bear another interpretation, when those sections have to be discussed, than they do in the group of sections which are now under consideration.

It seems to me that the true construction of this section, dealing with the registration and also with the non-registration of a ship, is that the words "tons burden" mean the net tonnage—that is, the gross tonnage after allowing for the deductions, in other words, the register tonnage.

For these reasons I am of opinion that the judgment of Gorell Barnes J. is right, and that the *Brunel* did not exceed 15 tons burden. It follows, therefore, that there was no necessity for registration, which was the point contended for by the owners of the tug when they brought their action for limitation of their liability.

COLLINS L.J. I confess that I have felt some doubt in this case, which has not been wholly removed by the arguments of

counsel for the respondents; but I think, on the whole, that the judgment of Gorell Barnes J., and that of my Lord here, is the safer conclusion to adopt.

When the history of this matter is looked at in order to ascertain the principle upon which the Legislature excluded certain ships from the benefit or burden, it may be, of registration, it seems that, in the first instance, it provided that certain British ships alone should be entitled to registration, and then proceeded to give a certain class of ships the benefit of being British ships without registration. That class was the class of ships, not exceeding 15 tons burden, employed solely in navigation on the rivers and coasts of the United Kingdom, and, looking at that from a common-sense standpoint, it does seem to me as if size was what the Legislature meant to be material in deciding the question whether it would insist upon a vessel getting registered before claiming the benefits of being a British ship within that legislation.

At the time that that legislation was initiated steam was not known, and the carrying capacity of a ship was practically the same thing as its size. It was necessary to have a uniform method of arriving at the carrying capacity, but up to the introduction of steam that corresponded more or less accurately with the size of the ship. The result of that was that certain small vessels, which were not supposed to be capable of crossing the seas, were excluded from registry. Then the Legislature, having had some difficulty before as to the best method of ascertaining the capacity, found itself face to face with a new difficulty, by reason of the introduction of steam, and it had to substitute a new standard to ascertain the carrying capacity, which was the thing which was important to be ascertained for many purposes. It introduced a new standard of carrying capacity, which involved the exclusion of engine-room space and so on, for the first time in 59 Geo. 3, c. 5, and more elaborately in 5 & 6 Will. 4, c. 56, by which it was provided that in steamers the cubical contents of the engine-room were to be deducted from the total tonnage in order to arrive at the true register tonnage. Now, we stand in this position—that

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the exception remained the same, but a different standard of measuring capacity was introduced.

The argument of counsel for the appellants does not seem to me to be open to the criticism which was addressed to it by counsel for the respondents. It seems to me that it would be perfectly possible still to make size—but size scientifically ascertained—the standard of calculation. It seems to me that the principle of determining whether a vessel comes within the legislation or not need not necessarily be the same as in ascertaining what is her registered tonnage. But there is this anomaly also, which appears to me to be involved in the position resulting from the judgment of Gorell Barnes J., and that is that, if size was the ground upon which the vessels were excluded, you have, under the method which the learned judge has applied, this possible anomaly—that ships which are very large in actual fact, and which certainly could not have been contemplated at the time the exemption was introduced, may, and very often do, come within the exemption. On the whole, however, I think it is, perhaps, wiser to hold that one standard, and one standard only, is to be applied when you are seeking to ascertain the tonnage of the ship, and that is the standard laid down by the Legislature, and which results in the registered tonnage.

It is perfectly true that in the process of ascertaining the registered tonnage the gross tonnage is first ascertained; but it seems to me that that is obtained and stated, not by the mandate of the Legislature, as being the result which has to be ascertained, but merely as arising from this—that the Legislature thought it right that the process by which the result was obtained should be bared, so that, I suppose, it could be checked. That which has to be ascertained, and which the Legislature makes the object of the calculation, is the registered tonnage, and not one of the steps in ascertaining the registered tonnage. I think, therefore, that there is little real difficulty once you are driven away from the point taken in the Court below, namely, that what is really meant is carrying tonnage as differing from the registered tonnage. I think, when once you are driven from the contention that it was the actual pos-

sible amount that the ship could carry, there is something anomalous in stopping short in the middle of the calculation which the Legislature has enacted, and accepting one of the steps towards the goal instead of the goal itself—namely, the gross tonnage, which is only a step towards ascertaining the registered tonnage, instead of the registered tonnage itself.

I would add this—that it seems to me that counsel for the appellants are perfectly well founded in saying that in some parts of this Act the word "tonnage" is capable of meaning, and necessarily must mean, gross, as distinguished from net, tonnage. I also think that in some parts of the Act burden means gross as distinguished from net; but that does not carry them far enough. We have to say, from the context and from the best view we can form of what the object of the Legislature was in making this standard of inclusion or exclusion, what interpretation is to be put upon it. It is capable of either, and I think that on the whole the safest is that which has been adopted by the learned judge in the Court below.

VAUGHAN WILLIAMS L.J. I agree, and the reasons which have been given by the other members of the Court seem to me so ample and satisfactory that I only propose to say a word or two.

The question is: what is the meaning of the words "ships not exceeding 15 tons burden will be exempted from registry"? Can it be doubted that primâ facie you are to use the same standard in arriving at the 15 tons, which is to exempt from registry, that you will have to use when you ascertain the tonnage of a vessel which has to be registered? It is said here that you ought not to do it, and the reason which is suggested for applying what I cannot help calling an unnatural interpretation to these words is this: If you apply a natural interpretation, you will, having regard to the various purposes of this Act of Parliament in reference to the parts of the Act where "tonnage" is used, arrive at a result which it is not likely the Legislature could have contemplated. I say, in answer to that, in the first place, that I have only to deal with the construction of these words in this particular part of the Merchant

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Shipping Act which deals with registration. With regard to the words that appear in this part of the Act, the word "burden" does become of importance, not as the basis of an argument, but as enabling us historically to arrive at really what was the purpose of this section.

It cannot really be doubted that the whole of this section—which has appeared in various shapes since—is derived from 7 and 8 Will. 3, c. 22. That was an Act passed for the purpose of preventing frauds and regulating abuses in the plantation trade. There is a provision that only British ships should have the benefit of the trade between this country and our plantations, which in those days included the whole of what are now the United States of America, and the Act provides for registration. In doing so it describes the kind of ship which may be registered—broadly, ships built at ports in England and certain places in the plantations—and then says that the registration shall be upon the oath of the master as to the tons burden. That shews the origin and reason of the registration. Presently, when you come to 26 Geo. 3, c. 60, it was desired to amend this Act, and to include some of those ships which had been excluded before, and it is in s. 3 of that Act that this limitation of 15 tons is first found. I cannot doubt that when the 15 tons limitation was first introduced, it was intended that that 15 tons—which was the 15 tons, be it observed, which was introduced, among other reasons, at all events, as a limitation of the class which should be entitled to the privilege of being registered for the purpose of navigating between this country and the plantations—was to be measured by the standard that was introduced into that statute. It is true that is not the standard with allowances which is now used. That standard with allowances was first introduced into the Act of 13 Geo. 3, c. 74, amended by 26 Geo. 3, c. 60, which was amended by 59 Geo. 3, c. 5.

The Act 7 & 8 Will. 3, c. 22, introduced the necessity for registration and used the word "burden," but excluded the smaller ships altogether. The amending statutes included the smaller ships, and provide a measure for the 15 tons, which was a measure of the interior capacity of the ship, without any

deduction at all. Then comes the later statute, which was necessitated by the introduction of steam. That was the statute which introduced substantially the mode of measurement which still exists in the last Merchant Shipping Act, and provided a mode of measurement which was intended substantially to take into account all the carrying capacity of the ship.

Under these circumstances, I have no doubt that the 15 tons mentioned in s. 3 of the present Merchant Shipping Act is 15 tons registered net tonnage, and not 15 tons gross tonnage.

Appeal dismissed.

Solicitors for appellants (defendants): *Thomas Cooper & Co.*

Solicitors for respondents (plaintiffs): *Robins, Hay, Waters & Hay, for D. Travers Burges, Bristol.*

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Dec. 4, 5, 6.

Admiralty—Collision—Vessel Turning Round—Thames By-laws, 1898, *Art.* 48.

Art. 48 of the Thames By-laws, 1898, by which steam vessels "crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down," does not apply to a steam vessel turning round on the same side of the river as that on which she is being navigated, although, when athwart the river, in the process of turning, part of her may, owing to her length, be across the line of mid-stream.

The River Derwent, (1891) 7 Asp. M. L. C. 37, distinguished.

ACTION of damage by collision.

The plaintiffs were the owners of the *Dalmatia*; the defendants were the owners of the *John Hollway*.

The question involved the consideration of the relative duties of steam vessels, one of which is turning in, and the other proceeding up or down, the river Thames.

The facts, so far as material, were shortly as follows:—

On June 23, 1899, about 12.30 P.M., the weather being fine

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and clear, and the tide third quarter flood of the force of about two knots, the *Dalmatia*—a German screw steamship of 1263 tons net register, owned by the plaintiffs, from Sundsvall to London with a cargo of wood and iron—was on the south side of the Lower Pool of the river Thames, preparing, in charge of a pilot, to enter the Surrey Commercial Dock. She had blown four short blasts on her steam-whistle, in accordance with the Thames by-law No. 40, to indicate that she was turning round, and was nearly athwart the river, with her head to the northward, swinging, with the assistance of a tug on her starboard bow, her starboard anchor being down and her engines stopped; when the steam-tug *John Hollway*—owned by the defendants, which was proceeding up the river with four barges in tow, making about three knots over the ground, and which had starboarded to pass to the southward of the barge roads, and then ported to clear craft at the tier—was heading to pass between the stern of the *Dalmatia* and a Russian barque at anchor. The tug succeeded in passing through this space, but she failed to draw the barges clear, the first barge on the starboard rope striking the rudder and propeller of the *Dalmatia*, doing considerable damage.

The plaintiffs contended that it was the duty of the *John Hollway*, when approaching the *Dalmatia* so as to involve risk of collision, to slacken her speed in accordance with art. 49 of the Thames By-laws.

The defendants contended that those in charge of the *Dalmatia* brought about the collision by coming astern in breach of art. 48 (1), and that, as the *Dalmatia* was bound, under that by-law, to keep out of the way, it was the duty of the *John Hollway*, under by-law 53, to keep her course and speed. (2) In support of the contention that the *Dalmatia* was at the material time "crossing from one side of the river towards the other," so as to be under the obligation of keeping

(1) By-laws for the Regulation of the River Thames and the Navigation thereof, 1898:—

Art. 48: "Steam vessels . . . . crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down."

(2) Art. 53: "Where by the above by-laws one of two vessels is to keep out of the way the other shall keep her course and speed."

out of the way of the *John Hollway*, the defendants relied upon *The River Derwent*. (1)

Dec. 4, 5. *Aspinall*, *Q.C.*, and *Stubbs*, for plaintiffs, the owners of the *Dalmatia*.

Laing, *Q.C.*, and *Lauriston Batten*, for defendants, the owners of the *John Hollway*.

Cur. adv. vult.

Dec. 6. BUCKNILL J. The evidence in this case is conflicting. The story told by the witnesses for the plaintiffs is that the *Dalmatia* had been navigating up the Thames on the south side of the river withal, and when a little below the entrance to the Surrey Commercial Dock her helm was put to port in order to turn her round and take her into the dock, which is on the south side of the river; that when she had answered about ten points under her port helm, which means that her head would then be about two points more than right across the river, she was dead in the water, her anchor having previously been let go, partly for the purpose of checking her way, on account of a barge which was anchored ahead, and partly to help her to swing, the anchor having hold of the ground, as I find as a fact, and not what is called dredging. When in this position, and with a water space, between the stern of the *Dalmatia* and a Russian barque, according to

(1) 7 Asp. M. L. C. 37. In that case the facts were shortly as follows: On December 19, 1888, about 10 A.M., the weather being fine and clear, and the tide first quarter flood, the plaintiffs' steamship *Allendale*, laden with coal, had come up the river Thames, as far as Bugsby's Reach, and was on the south side of mid-channel, when she received orders from the coal derricks to bring up. In order to moor head to tide at some buoys, she moved her engines ahead, ported her helm, and, having got across mid-channel, was approaching the north shore, when her engines were stopped, her anchor let go so as to dredge over the ground and check her way as she swung round head down stream, but before she had finished swinging, and whilst still heading towards the north shore, the defendants' steamship *River Derwent*, which was following another vessel up the river, and was on the north side of mid-channel, failed to reverse her engines in time, and struck the *Allendale* amidships on the starboard side. The House of Lords held that the *Allendale* was, at the material time, crossing within the meaning of art. 24 (now 48) of the Thames By-laws, and was, therefore, bound to keep out of the way.

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the plaintiffs' witnesses, too narrow for the tug *John Hollway*, with her barges in tow, to pass through, the tug is said to have attempted to accomplish the impossible, and so to have caused the collision between the first barge on her starboard rope and the rudder of the *Dalmatia*.

The case set up by the defendants, shortly stated, is that the *Dalmatia*, having blown a four-blast signal, had got into a position of about athwart the river; just as the tug and her barges were passing between her stern and the Russian barque, and that the *Dalmatia* came astern and so caused the collision, there being plenty of room for the tug and her barges to pass safely if the *Dalmatia* had not come astern.

It is admitted that nothing was done by the *Dalmatia* to keep out of the way of the tug and her barges; but the charge made against the tug is that she might have avoided the collision by reasonable care. It is not proved to my satisfaction that any steps could, in the circumstances, have been successfully taken on board the tug, except easing her way and so allowing the *Dalmatia* to swing more up and down, and thus increase the waterway between herself and the Russian barque.

On the question of fact whether the *Dalmatia* did, at the critical time, move astern, I am satisfied, after hearing the witnesses on both sides, that she did not, and I find as a fact that she was making no movement through the water at the time of the collision; but that her stern was swinging slowly round, so that if the collision had not occurred when it did, she would have safely swung round head on tide, when, I suppose, the anchor would have been lifted and she would have proceeded into dock.

On the question of law, whether a vessel turning in the Thames, as the *Dalmatia* was, on the same side as that on which she is being navigated, so far as that is possible, having regard to her length, is a crossing ship within the meaning of art. 48 of the Thames By-laws, the case of *The River Derwent* (1) has been cited. That case turned on the construction to be placed on arts. 24 and 25 of the old by-laws corresponding with arts. 48 and 53 of the by-laws now in force, and which are to

(1) 7 Asp. M. L. C. 37.

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be read together. [The learned judge read these two articles already set out, and continued:—]

The facts in the case of *The River Derwent* (1) differ from those in this. There the *Allendale* was in the act of crossing the Thames from the south to the north side, and, whilst still performing that manœuvre, the collision happened. She was held to be a crossing vessel within the rule. The Lord Chancellor in his judgment pointed out that it was "undoubtedly a fact that the *Allendale* did cross from one side of the river to the other." He also said that when the vessel has left the south shore and is going towards the north shore she is in the act of crossing. In this case the *Dalmatia* did not leave the south side of mid-river, although by reason of her great length, when she was athwart, some part of her hull was on the north side of mid-stream; but she never, in fact, crossed the river, and it was never intended that she should do so. The manœuvre intended was simply that of turning round in the river, on the south side of mid-channel so far as that was possible.

It is true that she was not proceeding up or down the river, but was being turned round in it, and this affords the only difficulty that I feel on the construction of the by-law—that is, whether the rule applies to all such steam vessels as are not proceeding up or down river, but are crossing from one side to the other, or are turning round, as this vessel was. If such a construction is to be given to the by-law, it applies to small and short vessels as well as to the largest and longest.

I cannot construe the rule to mean more than it seems to me to state, and I think I should be doing so if I held that it applies to every steamer which is being turned round in the river, although I do not say that a vessel so turning might not at some time, whilst in progress of turning, be crossing towards the other side. It would depend upon the facts of each case, and it seems to me to be very hard as against steam vessels if such vessels, when athwart the tide, in the act of turning round for the purpose of getting into dock, were held in all cases, when in such a position, to be bound to keep out of the way of

(1) 7 Asp. M. L. C. 37.

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vessels navigating up and down. Such vessels, in obeying the rule, would necessarily have to put themselves sometimes in positions of extreme difficulty and danger.

On the facts of this case I find that the *Dalmatia* was, at the time of the collision, partly athwart the river, and not in motion through the water, or moving ahead or astern over the ground, but was slowly swinging to her anchor in the act of turning round, and was not a vessel crossing the river within the rule; but, even if she were, I find as a fact that her omission to keep out of the way of the tug in no way caused or contributed to the collision. Those in charge of the tug had heard the four-blast signal from the *Dalmatia* which, under art. 40 of the by-laws, indicated that she was turning round. The rule states that "When a steam vessel (in circumstances other than those mentioned in by-law 36) is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel . . . . she shall signify the same by four blasts of the steam whistle." It is admitted that that signal was sounded by the *Dalmatia*. The master of the tug thought that, by the time he reached the *Dalmatia*, she would have swung head to tide, but he miscalculated his speed and distance, and, as he approached the *Dalmatia*, he put on his engines full speed and made a dash for it, with the result that although he passed through in safety, so far as the tug was concerned, one of his barges collided with the rudder of the *Dalmatia*. If he had eased his engines sooner, and kept them eased longer, there would have been no collision, and in my judgment it was by his negligence alone that the casualty occurred. This view is confirmed by the advice I have received from the Elder Brethren of the Trinity House who are assisting me.

[The learned judge then dealt with the evidence as to the actual distance between the stern of the *Dalmatia* and the Russian barque, and found it not to be as great as was alleged by the defendants. With regard to certain entries in the engine-room log of the steamship, the learned judge said:—]

Believing as I do the evidence from the *Dalmatia*, that the engines had been stopped for a few minutes before the collision, I disregard the entry in the log as affording positive proof that

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the engines were moving astern at the time of the collision. I find as a fact that there was not a bad look-out on board the *Dalmatia*, and, in the circumstances of the case, I pronounce the defendants' tug, the *John Hollway*, alone to blame for the collision.

Solicitors for plaintiffs, the owners of the *Dalmatia*: *Stokes & Stokes.*

Solicitors for defendants, the owners of the *John Hollway*: *William Hurd & Son.*

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Dec. 14, 15, 18.

Admiralty—Collision—Anchor Light—"Forward Part of the Vessel"—Regulations for Preventing Collisions at Sea, 1897, *art.* 11.

By art. 11 of the Regulations for Preventing Collisions at Sea "a vessel of 150 feet or upwards in length, when at anchor, shall carry" two anchor lights, one "in the forward part of the vessel . . . .":—

Held, by Bucknill J., that a vessel 313 feet in length, at anchor, with the forward light hanging to the fore-shroud of the starboard fore-rigging, 60 to 70 feet abaft the stem, was not carrying it "in the forward part of the vessel" within the meaning of the article.

ACTION of damage by collision.

The plaintiffs were the owners of the *Ella Sayer*; the defendants were the owners of the *Philadelphian.*

The case is reported on the question of the meaning to be attached to the words "forward part of the vessel" in the second paragraph of art. 11 of the Regulations for Preventing Collisions at Sea, 1897. (1)

(1) Art. 11: "A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to shew a clear, uniform, and unbroken light, visible all round the horizon at a distance of at least one mile.

"A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20 feet and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light another such light."

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The facts, so far as material, were shortly as follows:—

On August 10, 1899, about 11 P.M. in fine clear weather, a collision, involving loss of life and considerable damage, occurred in Quebec Harbour between the British screw steamship *Ella Sayer*, of 2549 tons gross register and 313 feet in length, lying at anchor in about mid-channel, heading up stream on an ebb tide, and the British screw steamship *Philadelphian*, which was proceeding down the river St. Lawrence in charge of a pilot, on a voyage from Montreal to Liverpool with cattle and a general cargo.

By their statement of claim the plaintiffs charged those on board the *Philadelphian* with not keeping a good look-out, not keeping out of the way of the *Ella Sayer*, and with proceeding at an excessive rate of speed. These charges the Court held, on the evidence, to have been established.

By their defence and counter-claim the defendants charged those on board the *Ella Sayer* with not keeping a good anchor watch, and with "not exhibiting any anchor lights or any proper or visible anchor lights properly carried and shewing as required by the regulations."

At the time of the collision the *Ella Sayer* was carrying two anchor lights, the one forward hanging on the fore-shroud of the starboard fore-rigging, 23 feet 6 inches above the forecastle deck, 8 feet from the centre of the mast, and about 60 to 70 feet abaft the stem.

Dec. 14, 15. *Laing, Q.C., Dawson Miller*, and *Roche*, for plaintiffs, the owners of the *Ella Sayer*.

Aspinall, Q.C., and *Glynn*, for defendants, the owners of the *Philadelphian*.

[The cases of *The Gannet* (1) and *The Para* (2) were referred to.]

Cur. adv. vult.

Dec. 18. BUCKNILL J. In this case the steamship *Philadelphian* collided with the steamship *Ella Sayer* in the river St. Lawrence, off Quebec, at about 11 P.M. on August 10 last,

(1) [1899] P. 230. Marsden on Collisions at Sea, 4th ed.
(2) (1886) Not reported: see p. 425.

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THE PHILADELPHIAN.

Bucknill J.

whilst the *Ella Sayer* was at anchor. There was nothing in the weather to account for the casualty, as it was a fine and clear night, and the excuse set up is that the anchor lights of the *Ella Sayer* were not burning, or, if burning, were giving such a poor light that it was impossible to see them in time to avoid the collision.

[The learned judge then dealt at length with the evidence, and came to the conclusion that, at the time of the collision, both the forward and after anchor lights of the *Ella Sayer* were burning brightly; that there was a bad look-out on board the *Philadelphian*; and that that vessel was being navigated at an excessive rate of speed. The learned judge continued:—]

The *Philadelphian* must, therefore, be found to blame. That being the case, is the *Ella Sayer* to blame? She is not to blame unless there is a breach by her of art. 11. Now, the forward light was in the starboard fore-rigging, abaft the stem, and the after light was on the flagstaff. Art. 11 provides: [The learned judge read the article, already set out, and continued:—]

The Legislature has decided that a vessel under a certain length need only carry one light, but that a vessel of 150 feet or upwards shall carry two lights. The forward light is to be "in the forward part of the vessel." What does that mean? It may mean one of three things. It may mean a light fixed forward of the middle length of the ship, because directly you get forward of the middle length of the ship you are in the forward part of the vessel. It may mean that you are to put it as far forward as possible—right forward, which it does not say—or it may mean that it may be put in any spot between just forward of mid-length and the stem. I think, speaking under the advice of the Elder Brethren as to what may be reasonably called the forward part of the ship, that it may be put on one of the forward stays. If it is hung at the proper height on the forestay it would necessarily have to be somewhere abaft the stem or it might be put on the fore-topmast stay, but it must be abaft the stem. Now, in a case in the Court of Appeal, that of *The R. L. Alston* (1), I find a passage

(1) (1882) 8 P. D. 5.

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Bucknill J.

which appears to give me some assistance. There Brett L.J. says, in effect, that where you find a rule or article which is capable of two constructions, as I find that this art. 11 is, you ought to put upon the language that which you believe in the particular case to be the reasonable construction.

It is quite clear that this article is capable of more than one construction. In the forward part may mean two or three different places, and I have to construe it in this case, and, if it is necessary, to decide the point. I hold that to put a light in a vessel, 313 feet in length, 60 or 70 feet abaft the stem, is not to place it in the forward part of the vessel, and if it was important in this case I should find that it was not in compliance with the article. The object of the rule probably is that where you have a vessel exceeding 150 feet in length, at anchor, those navigating the river should have good information as to her length; that when she is swinging in the river the vessels approaching her from astern or ahead should have an opportunity of knowing the length of the ship. How could that be given if the forward light is 60 or 70 feet from the stem? But whilst I am putting this construction upon the rule, it will not in this particular case affect the judgment of the Court with regard to the responsibility of the *Ella Sayer*, because, although I find that the light was not placed in accordance with art. 11, on my construction of it, I find, also, that that could not by any possibility have contributed to the collision. I say that for this reason, that the defendants' witnesses never saw the light at all. They swear that there was no light, but, as it is not suggested that the light was not hung skilfully and properly in the shrouds, it was therefore throwing an unbroken light all round the horizon, and it is clear to my mind that such breach of the article could not possibly have contributed to the collision. In this case, therefore, my judgment is that the *Philadelphian* is solely to blame.

I may add that the Elder Brethren, who are assisting me, have suggested to me that art. 11 is a very puzzling rule for any seaman to understand, and I agree with them that the language is so ambiguous that I think, speaking for myself, it

might very properly be changed. How is a master to know where to put a light if he is only told to put it in the forward part of the vessel?

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THE PHILADELPHIAN.

Solicitors for plaintiffs, the owners of the *Ella Sayer*: *Botterell & Roche.*

Solicitors for defendants, the owners of the *Philadelphian*: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson & Hill, Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

1900

Jan. 11.

THE CAWDOR.

Admiralty—Co-ownership—Action of Restraint—Bond for Safe Return—Forfeiture—Jurisdiction—Discretion of Court.

By a bail bond, in an action of restraint, the sureties submitted themselves to the jurisdiction of the Court, and consented "that if the (named vessel) shall not safely return to the port of Liverpool, and the defendants (the owners of the vessel other than the plaintiff) shall not, in such case, pay to the plaintiff (the appraised value of his shares), execution may issue" against them.

The vessel which, at the time the bond was given, had been despatched by the defendants on a voyage from Hartlepool to Calcutta arrived at Dundee in Scotland, and left again on a voyage to New York there to load for Australian ports.

On motion by the plaintiff, Gorell Barnes J. pronounced the bond forfeited, and ordered the amount to be paid into court with liberty to the sureties to shew cause.

The defendants appealed:—

Held, by the Court of Appeal (A. L. Smith, Rigby, and Collins L.JJ.), that there was jurisdiction to make the order, and, assuming a discretion in the Court in respect of the enforcement of a security given to the Court, that discretion had been rightly exercised, as the condition of the bond for safe return was not limited to the case of the vessel being lost, but was broken by the ship, instead of returning to Liverpool, being taken to a port out of the jurisdiction of the English Admiralty Court, and then sent on another voyage.

APPEAL by defendants, the owners of the sailing ship *Cawdor*, other than the plaintiff, against an order of Gorell Barnes J. pronouncing the bail bond for safe return given by sureties on behalf of the defendants to be forfeited.

C. A. 1900

THE CAWDOR.

On August 19, 1898, William Auld Graham of Glasgow commenced an action of restraint, indorsing the writ as follows: "The plaintiff, as owner of eleven sixty-fourth shares of the sailing ship or vessel *Cawdor* of the port of Liverpool, being dissatisfied with the management of the said ship by his co-owners, claims that his co-owners shall give bail in the sum of 2750*l.*, the value of his shares, for the safe return of the said ship to the port to which she belongs, namely, the port of Liverpool."

The value of the plaintiff's shares being disputed by the defendants, John Houston & Co., of Liverpool, managing and majority owners, an order was made that bail should be given in respect of eleven sixty-fourths of the appraised value of the ship, and, on September 1, a bond was executed by two sureties in these terms: "Whereas an action of restraint has been commenced in the High Court of Justice on behalf of (the plaintiff) against the owners of the *Cawdor* other than (the plaintiff). Now, therefore, we, the undersigned (sureties) hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that if the said sailing ship or vessel *Cawdor* shall not safely return to the port of Liverpool, and the owners of the *Cawdor* other than (the plaintiff) shall not in such case pay to the plaintiff or his solicitor the sum of 1718*l.* 15*s.*, execution may issue forth against us. . . . for a sum not exceeding" the above amount.

At the time the bond was executed the vessel had been despatched by the defendants on a voyage from Hartlepool to Calcutta. On August 21, 1899, she arrived in the port of Dundee in Scotland, and on September 26 the plaintiff wrote to the defendants giving them notice that he wished to participate in the working of the next voyage. The defendants wrote the following day in reply that "it is not competent for you at the present time to elect to participate in the working of the ship unless we consent to the cancelment of the bond you exacted from us last year; consequently we decline to give effect to your notice."

In the meantime the vessel had been re-chartered by the defendants, and on October 4 sailed for New York, there to

load for Melbourne and Sydney. On October 23 the plaintiff served on the defendants a notice of motion "that the bond given in this action for the safe return of the *Cawdor* to the port of Liverpool may be pronounced to be forfeited, and that the amount thereof may be ordered to be paid into court if the said vessel do not return within one month to the port of Liverpool, or, in the alternative, for a declaration that the plaintiff is entitled to participate in the future working of the said vessel on delivery up of the said bond to the defendants to be cancelled."

The bond was lodged in court, and, at the hearing before Gorell Barnes J. on October 31, the learned judge intimated that, in his opinion, the words in the bond, "return to Liverpool," meant return from the then intended voyage, and the case stood over to see if a settlement could be arrived at in the terms of the alternative part of the motion; but on November 1, no agreement having been come to, and the plaintiff being willing to hand over his shares to the defendants, the learned judge "ordered that the bail bond given by the defendants for the safe return of the ship *Cawdor* to the port of Liverpool be forfeited, and the sum of 1718*l.* 15*s.*, the amount of such bond, be paid into court within ten days, that the sureties bound by the said bond do have leave to appear and shew cause why the aforesaid amount should not be paid into court, and that a copy of this order be forthwith served upon the said sureties," and the learned judge condemned the defendants in the costs of the motion.

The defendants appealed.

1900. Jan. 11. *Carver, Q.C.*, and *Aspinall, Q.C.*, for the appellants (defendants). There is no precedent for the construction which the learned judge in the Court below has put upon the bond. He seems to have regarded it as equivalent to a contract between the parties by which the defendants agreed that if the vessel did not return to the port of Liverpool on the completion of the particular voyage upon which she had been despatched, then the bond was to be deemed forfeited, and the defendants were to become purchasers of the shares of the

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plaintiff at the price mentioned in the bond. The bond is not, however, given by the defendants, it is a stipulation entered into by sureties with the Court for the purpose of enabling the majority owners to work the vessel, and, at the same time, enable the Court to protect the property of the minority. The object is to prevent the ship being kept idle by the minority owners against the will of the majority. The forfeiture of the bond is a matter in the discretion of the Court, and that discretion is never exercised unless the vessel does not return by reason of being lost—that is, a liability does not arise unless the defendants cast the ship away.

In *Lambert* v. *Aeretree* (1) the ship was lost on the voyage in respect of which a recognizance had been given, and, on the plaintiffs suing the persons bound in Admiralty, a prohibition was refused on the ground that it was reasonable that the part owner should have security "that the ship shall return in safety." Referring to this case, it is stated in Abbott on Shipping, 5th ed. p. 73, that the jurisdiction of the Court of Admiralty was recognised and confirmed both as to the taking of such security and "enforcing the performance of the stipulation upon the loss of the ship."

In *The Margaret* (2) the Court declined to pronounce for the forfeiture of a bond given for the safe return of a vessel to a particular port on the ground that the application was premature, the vessel being at the time safe in another port under a warrant of arrest. In that case, in his judgment, Sir Christopher Robinson says (3) that "the bond prescribes an obligation to bring back the vessel; and in some bonds, particularly in that which is printed in the appendix of Abbott, the terms are general 'to return' without mention of a particular port. And it may be questionable, whether that may not be the proper extent of the remedy"; and in commenting on the form of the bond in *The Anne* he observes (4) that that case was "the only instance, in recent times, in which this Court is shown to have proceeded so far as to pronounce for a forfeiture of the bond, where no actual loss had happened to the vessel";

(1) (1697) 1 Ld. Raym. 223.
(2) (1829) 2 Hagg. Adm. 275.
(3) 2 Hagg. Adm. at p. 278.
(4) (1829) 2 Hagg. Adm. 279, n.

but in the note on that page it is stated that the vessel, having arrived, the parties cited were dismissed from the effect of the monition. In *The Regalia* (1) Butt J. held that, though the vessel had not returned to the actual port mentioned, the bond was still in force having regard to the fact that the vessel was still in existence and capable of being returned to the port specified in the bond. In *The Vivienne* (2) the bond had been in existence three years before the sureties were relieved. It is submitted that as the bond is not limited to employment on one voyage, and as the vessel has not yet come within the jurisdiction of the Court in which the security was given, the condition has not been broken; and as there has been no improper working of the ship, and no loss, there was no jurisdiction to make the order.

Laing, *Q.C.*, and *Balloch*, for the respondent (plaintiff). It is clear from the cases cited on behalf of the appellants that the Court has jurisdiction to pronounce for the forfeiture of a bond for safe return although the vessel has not been lost. In *Lambert* v. *Aeretree* (3) the decision of the Court of King's Bench was in favour of the jurisdiction, and did not turn on the fact that the vessel had been lost. In *The Margaret* (4) the vessel was under arrest in another port, and therefore, as the majority owners could not for that reason then comply with the terms of the bond, the application was deemed premature; but the jurisdiction was not disputed, the remarks of Sir Christopher Robinson being directed to the difficulties, which do not now exist, but which then hampered the Admiralty Court, owing to the restrictions placed on its functions in respect of the transfer of the title to the shares in a vessel. In *The Anne* (5), referred to in that case, the jurisdiction was not questioned, but as the vessel arrived at the specified port the sureties were relieved from their obligation. In *The Regalia* (1) the form of the bond was not correct, as the sureties bound themselves to answer any judgment against the defendants. In *The Vivienne* (2) it was held to be unreasonable for the

(1) (1884) 5 Asp. M. L. C. 338.
(2) (1887) 12 P. D. 185.
(3) 1 Ld. Raym. 223.
(4) 2 Hagg. Adm. 275.
(5) 2 Hagg. Adm. 279, n.

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sureties to be compelled to remain liable indefinitely, and so far that case supports the contention of the plaintiff that he is not bound to wait, it may be for years, until the defendants choose to bring the vessel back to Liverpool. In *The Robert Dickinson* (1) the proper form of bond was discussed, and Butt J. decided that the minority owners are entitled to a bond in the agreed, or appraised, value of their shares for the safe return of the ship to a particular port. That is the form of the bond in the present case; and as the condition has been broken, the vessel not returning to Liverpool on the completion of the voyage on which she had been despatched, there is clearly jurisdiction to make the limited order appealed against, as it amounts to no more than an order to bring the money into court, subject to the right of the sureties to shew cause against it.

Carver, Q.C., in reply. In *The Robert Dickinson* (1) the form of the bond was brought back to that in use in 1829: see the note to *The Margaret* (2); and therefore the remarks of Sir Christopher Robinson apply as to the limited construction to be placed upon these bonds in respect of their enforcement.

A. L. SMITH L.J. I think that there is force in the argument of counsel for the appellants as to the nature of the bond now in question. I agree that it is a class of security given by sureties to the Court, to be enforced by that Court, when it thinks right to enforce it, against the sureties; but is it a bond with regard to which the sureties can in no case be called upon by the Court to pay into court that which they have undertaken to pay, unless the ship be lost; or is it a bond which the judge sitting in Admiralty has jurisdiction to enforce, if he consider the circumstances of the case are such that enforcement of the bond is right as between the parties?

The bond is in this form: "Now, therefore, we, the undersigned, hereby jointly and severally submit ourselves to the jurisdiction of the Court, and consent that if the sailing ship *Cawdor* shall not safely return to the port of Liverpool"—I stop there to observe that these words cannot be read as "If

(1) (1884) 10 P. D. 15. (2) 2 Hagg. Adm. 278, n.

the ship *Cawdor* is lost, and, therefore, shall not return to the port of Liverpool "—it is in general terms—" and the defendants shall not in such case pay to the plaintiff the sum of 1718*l.* 15*s.*, execution may issue against us," the two sureties. What was that bond given for? It was given for the safe return of this vessel to the port of Liverpool, and the enforcement appears to me to have been left to the judge of the Court when he thinks it reasonable to do so, if the ship has not within a month's time returned to the port of Liverpool. Now, what happened? The ship returned to Dundee, not to the port of Liverpool, and she there—unknown to the plaintiff, and at a port over which the Admiralty Court of this country has no jurisdiction—was re-chartered by the defendants, and sent off on October 4, 1899, on a voyage to New York, and thence to Australia.

The plaintiff had been trying, apparently, to get a share, notwithstanding the bail bond, in the future voyages, and the majority owners said, "No, you shall not have a share"; and the result is that, having got this bail bond, which is very poor satisfaction if it is not to be enforced, he has to stand out without any profit, whilst the majority owners send the vessel to all parts of the globe.

The plaintiff thereupon applies to the Admiralty Court. He takes up the only position open to him. He asks that the vessel shall be returned to the port of Liverpool within a month or the bail forfeited, or, in the alternative, for a declaration that he is entitled to participate in the future working of the vessel on delivery up of the bond; but it appears that no agreement could be come to as to the latter part of his application.

Now, what is the position? In my opinion, as a matter of law, Gorell Barnes J. had jurisdiction to make the order which he did. None of the cases which have been cited shew that he has not. Indeed, in *The Margaret* (1) Sir C. Robinson seems to say that he had. The learned judge made an order in the present case that the sum which the sureties have bound themselves to pay if the ship does not come back to Liverpool shall be paid into court. Was it right to make that order? The majority owners say, "No, he should not have made that

(1) 2 Hagg. Adm. 275.

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A. L. Smith L.J.

order, but let this ship go on the voyages"—as far as I can see, all over the face of the globe—and not come back to the port of Liverpool till the majority owners agree to let her do so. I asked counsel for the appellants several times during the argument, "How long do you say this was to last? What limit do you put?" The answer was, "You need not put any limit at all." To that answer I do not agree. I think that some limit ought to be put. To keep this plaintiff out of his money for one or two, or, it may be, fourteen or fifteen years, is not, I think, a thing which the Court ought to sanction, and so the judge has made the order appealed from.

For these reasons I am of opinion that the order made by the learned judge in the Court below is quite right, and that the appeal should be dismissed with costs.

RIGBY L.J. This case arises out of a disagreement between the co-owners—the owners in common—of a ship. It is clear that neither the Court of Admiralty nor any other Court has any right to restrain the majority owners from using the ship; but the minority owners, by bringing an action of restraint, can insist that sureties shall be procured by the majority owners, who shall give, not directly to the minority owners, but to the Court of Admiralty, a bond which will, at any rate, secure to the minority owners some rights.

What are the rights to which the minority owners are entitled? The defendants do not undertake to bring the ship back—they do not undertake anything, as I read it, but they only say, "If we do not bring the ship back, and if whilst we keep the ship we do not pay the assessed value of the shares, why then the sureties, who are willing to come under that obligation, undertake and bind themselves to pay that amount, namely, 1718*l.* 15*s.*" That is perfectly simple, and I do not see why the Court should not have what I think it was plainly intended the Court should have—the jurisdiction to make use of that bond in such a way as justice may require.

Now, the ship, at the end of the current voyage, came back to Dundee, which is out of the jurisdiction of the English Admiralty Court. It is quite right of the owners to bring her

there. They have no intention of bringing her to Liverpool, and were under no obligation to do so, and they probably never thought of bringing the ship to Liverpool. But then they might go on for twenty years taking her wherever they please; and is it to be supposed that this device of the Court of Admiralty for keeping some hold over majority owners is so ineffectual that it can only be applied to the case where the ship has gone to the bottom of the sea and is lost altogether? I looked with great interest at the case cited, *The Margaret* (1), but I do not find any such statement there, and, in fact, I find that there is cited by the learned judge who is delivering judgment a decision in another case (2), upon which I should rather suppose the motion in this case is founded. It is that, if the defendants do not bring the vessel back to Liverpool within a month, then the money shall be paid into court.

I cannot say what may be done in a further stage of the case, but I cannot see that there is anything wrong in what the learned judge has ordered—namely, that the money shall be paid into court, unless the sureties can shew reason to the contrary.

COLLINS L.J. concurred.

Appeal dismissed.

Solicitors for appellants (defendants): *Pritchard & Sons, for Hill, Dickinson & Co., Liverpool.*

Solicitor for respondent (plaintiff): *Charles E. Harvey.*

(1) 2 Hagg. Adm. 275. (2) *The Anne*, 2 Hagg. Adm. 279, n.

T. L. M.

Explained. *Re* COGHLAN (decd.). [1948] 2 All E.R. 68.

C. A.
1900
Jan. 25, 26.

[IN THE COURT OF APPEAL.]

MOHAN *v.* BROUGHTON.

Administration—Claim as Next of Kin after Distribution of Intestate's Estate — Action for Revocation of Letters of Administration — Laches — Acquiescence.

The plaintiff, who claimed to be entitled as next of kin of an intestate, three years after the distribution of the estate, sought to impeach the title of the persons amongst whom the estate had been distributed, on the ground of the illegitimacy of one of their ancestors, and for this purpose commenced an action for revocation of letters of administration which had been granted to one of the persons who had received a share of the estate under the distribution. The plaintiff was aware at the date of the distribution of the alleged illegitimacy, but pleaded want of means in justification of the delay in bringing the action:—

Held, that the action was not maintainable, because (1.) the plaintiff's object might be obtained, without revoking the letters of administration, by commencing an action in the Chancery Division for the purpose of following the assets into the hands of the persons who had wrongly received them; (2.) the plaintiff was debarred by laches and acquiescence from prosecuting her claim.

Decision of Gorell Barnes J. affirmed.

APPEAL by the plaintiff from a decision of Gorell Barnes J. (1)

The facts are fully stated in the judgment of Gorell Barnes J., and for the purposes of the present case may be sufficiently gathered from the head-note.

Bosanquet, Q.C., and *E. B. Calvert*, for the plaintiff. Two objections are raised to the plaintiff's claim: (1.) that the matter is res judicata; (2.) that she is debarred by laches from asserting her legal right to the property. As to the first ground, the matter is not res judicata, because res judicata can only be inter partes, and the plaintiff was not a party to the action for administration, and was not served with notice of the judgment and orders in that action, as provided by Order XVI., r. 40, so as to bind her; and this point was decided by the learned judge in favour of the plaintiff.

As to the second point, the learned judge relied upon *David*

(1) [1899] P. 211.

v. *Frowd* (1) and *Sawyer* v. *Birchmore* (2); but the decision in *David* v. *Frowd* (1) is an authority in favour of the plaintiff, subject only to the qualification upon her right to assert her claim that she must not have been guilty of wilful default; and the decision of Lord Langdale in *Sawyer* v. *Birchmore* (3), which is adverse to the plaintiff's contention, was reversed by Lord Cottenham. (4) Here the plaintiff has not been guilty of such laches or acquiescence as to debar her from prosecuting her claim. The delay is sufficiently accounted for by her want of means. There has been no wilful default on the part of the plaintiff.

Bargrave Deane, *Q.C.*, and *Barnard*, for the defendant.

LINDLEY M.R. I do not think the plaintiff has made out any sufficient ground for our interference. The case is in some respects peculiar, and there is some little difficulty about it. It is an application to revoke letters of administration granted to one of the next of kin, or a person who called himself one of the next of kin, of a person who died some few years ago. The Court does not revoke letters of administration as a matter of course. Grounds must be shewn for it; and the application or the citation by this lady was met by a summons summarily to stay her proceedings on the ground of res judicata and vexation. By consent every question of substance was agreed to be tried on the assumption that she was what she said she was—one of the nearest of kin; and upon that assumption Gorell Barnes J. has investigated all the facts, and has found that it is not a proper case in which to revoke the letters of administration. Now, what is it that this lady wants? She does not want to revoke the letters of administration for nothing. Of course, she has an object, and her object is this: she says that in an administration action which was commenced some few years ago the estate of the intestate has been distributed amongst the wrong persons. She does not quarrel, of course, with the ordinary routine work done by the administrator—

(1) (1833) 1 My. & K. 200; 36 R. R. 308.
(2) (1836) 1 Keen, 391; on appeal, 1 Keen, 825; 2 My. & Cr. 611.
(3) 1 Keen, 391.
(4) 1 Keen, 825; 2 My. & Cr. 611.

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Lindley M.R.

I mean the payment of debts, funeral and testamentary expenses, &c. Her object is not to disturb that, but the net residue or surplus after payment of the debts has been distributed amongst persons who she says are not entitled to it. Therefore she wants this revocation for the purpose of asserting her right. In other words, she wants to follow the assets into the hands of the persons who have got them. I do not myself see any difficulty in her commencing an action for that purpose in the Chancery Division. I hope that I shall not be supposed to advise her to do it. It appears to me that her case there would be almost, if not utterly, hopeless; but still, theoretically, she could do that, although the letters of administration had not been revoked.

Now, if her case is hopeless, and that is the view which Gorell Barnes J. has taken, because, having looked into the matter, he says, "You cannot succeed in getting what you want, and, inasmuch as you will not succeed in getting what you want, I will not revoke the letters of administration," I think that he was perfectly justified in dismissing the action. I do not say that it was frivolous or vexatious. Still less do I think that technically there is anything like res judicata. All that has been determined against her is that she is not a cousin. What relation the plaintiffs in the administration action have to the intestate has not been finally adjudicated upon in such a way as to bind her. That is the view of the learned judge. He says, "I do not think that the matter is res judicata. You knew perfectly well what difficulty there was, and you allowed the estate to be administered, taking no proper steps to prevent it, and I cannot upset that." I think that, having regard to her conduct and the facts disclosed in the affidavits, he was quite right, and that the appeal ought to be dismissed with costs.

VAUGHAN WILLIAMS L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *W. W. Gabriel; Witham, Roskell, Munster & Weld.*

H. B. H.

In the Goods of CHARLES HARLING.

1900
Jan. 15.

Administration—Intestacy—Father and Son—Doubt as to who died first—Probate Act, 1857 (20 & 21 *Vict. c.* 77)—*Grant under s.* 73.

Where a person who left no will was presumed to have died "in or since 1863," and his father died in 1866, also intestate, the Court made a grant under s. 73 to a brother of the presumed deceased, no representative of the father's estate having been appointed.

Motion for administration upon an intestacy.

The applicant, William John Harling, applied for a grant under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77), to the estate of his brother Charles Harling, whose death had been presumed (Gorell Barnes J., Nov. 13, 1899, on the motion of the present applicant) to have occurred "in or since 1863," and whose father, William Harling, had in fact died at Norwich on July 1, 1866, intestate.

The applicant and his brother were the only children and next of kin of William Harling, who left no estate unless he survived his son Charles Harling. No representative of the estate (if any) of William Harling, the father, who died intestate, had been appointed.

The applicant was unable to swear that his brother Charles Harling survived his father, having in fact no knowledge save as to the disappearance of his brother in 1863; and it was advanced on the applicant's behalf that if he were to take a grant in respect of his father's estate (if any) he would be unable to apply for administration in respect of the estate of his brother, because he would be unable to swear that the said Charles Harling, his brother, had predeceased his father.

Charles Harling, who left no will, was entitled on the death of his mother to a moiety of certain investments representing a sum of 400*l.*, bequeathed by the will of a person who died on March 23, 1864.

Priestley, for the applicant, moved for a grant under s. 73 to the estate of Charles Harling. Whether the said intestate

1900

HARLING, IN THE GOODS OF.

did or did not survive his father, the applicant would be beneficially entitled to the fund in question under the intestacy of Charles Harling, his brother. [He referred to *In the Goods of Peck.* (1)]

JEUNE P. The grant may go, under s. 73, upon the authority of that case.

Solicitors: *Grundy, Izod & Co., for Wiltshire & Son, Great Yarmouth.*

H. D. G.

1900
Jan. 22.

IN THE GOODS OF AGNESE.

Administration de bonis non—Intestacy—Shares in Foreign Railways—Legal Estate outstanding in the Intestate—Beneficial Owner a Bankrupt—Limited Grant to Trustee in Bankruptcy.

A. being the owner of certain shares in two foreign railway companies handed the certificates to C., who received the dividends as beneficial owner until he became bankrupt, after which the trustee in C.'s bankruptcy received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares; and administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bankruptcy,

The Court (Jeune P.) granted administration to him, in respect of the unadministered estate of A., limited to the shares in the two foreign railway companies.

MOTION by the trustee in bankruptcy of Christopher William Cattell for a grant of administration de bonis non in the estate of J. M. L. Agnese, limited to certain shares in two French railway companies, the certificates for some of which were within the jurisdiction, and of which Cattell was the beneficial owner at the date when he became bankrupt, but Agnese was the legal owner at the date of his death.

Joseph Matthias Lucas Agnese at one time carried on the business of a tailor in London, where he died on January 5, 1870.

Before his death, certain shares, which he had formerly possessed in the Western Railway of France and the Eastern

(1) (1860) 2 Sw. & Tr. 506.

Railway of France, had passed, together with the right of receiving the dividends thereon, into the hands of one Christopher William Cattell, who, after regularly receiving the dividends for some years, was adjudicated bankrupt in the Eastbourne County Court in October, 1896, and Edward Hobbs, chartered accountant, of Old Jewry, in the City of London, was appointed trustee of the estate of Christopher William Cattell.

Three certificates for the shares in the Western Railway of France were handed to the trustee, who, after full investigation both in England and France, arrived at the conclusion that the bankrupt was absolutely entitled beneficially to the shares; but it also appeared that the bankrupt was under the impression that the shares had passed to him by the mere delivery into his hands of the certificates, and was not aware that a formal transfer and registration was required in order to pass the legal estate from the deceased, J. M. L. Agnese, to himself; the fact being that similar shares and certificates were continually being dealt with on the London Stock Exchange without any formal transfer or power of attorney.

It was stated that a request for transfer, or, if preferred, a power of attorney (a form of which was indorsed upon the certificates), could be executed in this country as soon as a legal personal representative of J. M. L. Agnese should be appointed.

As to the shares in the Eastern Railway of France, it appeared that forty in number stood in the name of J. M. L. Agnese, and that the certificates for these shares also were formerly held by the bankrupt Cattell, who, from 1873 to 1889, received the dividends regularly; but who, since 1889, had received the dividends on twenty only.

The bankrupt stated in his public examination that he had lost the certificate for the remaining twenty shares, and inquiry by the trustee subsequently elicited the fact that no claim had been put forward by any one else to the dividends on these twenty shares, and that these dividends had not been collected from the company, though it appeared that some correspondence had passed early in November, 1896, between the company on the one hand and the bankrupt and his bankers or agents on the other hand, relative to the non-collection of the

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AGNESE, IN THE GOODS OF.

dividends, and to a portion of the shares comprised in the last certificate having been drawn for repayment some years before.

J. M. L. Agnese, who was a British subject, domiciled in England, died intestate, a bachelor, without any known next of kin.

In July, 1870, administration was granted to Jonathan Turner, a creditor, who swore that the estate was under 100*l*. He died some years later.

Israel Davis now moved that administration de bonis non in the estate of Agnese should be granted to the trustee in Cattell's bankruptcy, limited to the shares in the French railway companies, the legal estate in which was vested in Agnese at the time he died. Where there is a legal interest outstanding, the beneficial owner, or his representative, is entitled to a grant: *Crosley* v. *Archdeacon of Sudbury*. (1) At the time Agnese died, certain of the railway certificates were within the jurisdiction of this Court, and they have remained ever since within the jurisdiction, except when sent to France from time to time for the purpose of obtaining payment of the dividends. The certificates could not be validly dealt with except by the person in whom the legal estate was vested, and no one could successfully have brought an action in respect of the certificates, if they had got into wrong hands, except the person entitled to the legal estate: *Stern* v. *Reg*. (2) (See the judgment of Wright J.) Some of the certificates have been lost, but they too should be included in the grant for what it may be worth.

JEUNE P. I think you have made out a right to the grant in respect of all the shares in these two railway companies, the legal estate in which was vested in J. M. L. Agnese at the time of his death.

Solicitors: *Halse, Trustram & Co.*

(1) (1815) 3 Hagg. Eccl. 197. (2) [1896] 1 Q. B. 211.

H. D. G.

WALES *v.* WALES AND CULLEN.

1899
Dec. 18.

Divorce—Practice—Acts of Adultery subsequent to Date of Petition—Evidence—Admissibility.

Evidence of acts of adultery subsequent to the date of the petition may be admitted for the purpose of shewing what inference the Court ought to draw from evidence of previous acts of familiarity.

HUSBAND'S petition for dissolution of marriage, on the ground of his wife's adultery with the co-respondent.

The suit was undefended.

The petition, which was filed on September 14, 1899, alleged that the respondent had frequently committed adultery with the co-respondent, and that, on August 21, 1899, the respondent left Ramsgate, where the petitioner carried on the business of a licensed victualler, in the company of the co-respondent, and that since that date the co-respondent and respondent had lived together as man and wife in London and at Ramsgate, Canterbury, and Broadstairs, and "during that period" they had habitually committed adultery together.

It appeared, from the evidence, that the co-respondent had been a frequent customer at the public-house kept by the petitioner; that on one occasion, during the petitioner's absence from home, the co-respondent had gone with the respondent, after the house was closed for the night, into a sitting-room adjoining the bar, and that the barman left them there together about midnight, when he went to bed. The barman also stated that he had seen them kissing each other on several occasions, and that on one occasion, during the first week in August, 1899, when the co-respondent remained at the house all night, he had, by order of the respondent, taken up some refreshment to the room on the third floor, which the co-respondent was to occupy, and had there found the respondent sitting on the bed in her petticoat, the co-respondent being at the time seated in a chair in the room, with his boots off; and, after remaining a short time in the room, the barman retired, leaving the respondent still in the room with the co-respondent.

1899

WALES v. WALES.

On August 20, by order of the respondent, the barman took two travelling trunks to the station, where he left them, labelled "Mrs. Fowler; to be called for," and, on the following day, the respondent left the house, and never returned.

Barnard, for the petitioner, tendered evidence to shew that in October and November, 1899, the respondent and co-respondent were living together as "Mr. and Mrs. Fowler" at a temperance hotel at Broadstairs.

[GORELL BARNES J. That is after the date of your petition.]

The evidence is admissible as tending to shew what inference the Court ought to draw from the acts of familiarity of which evidence has already been given, and which relate to a period anterior to the filing of the petition.

GORELL BARNES J. admitted the evidence, and thereupon held that the charge of adultery was established, and pronounced a decree nisi, with costs against the co-respondent.

Solicitors: *Prior, Church & Adams, for Sparkes & Emery, Ramsgate.*

H. D. G.

COOPER-KING *v.* COOPER-KING.

1900
Jan. 11;
Feb. 1.

Divorce—Practice—Colonial Marriage—Evidence of Validity.

Where, upon the hearing of a petition to dissolve a marriage which had been celebrated in the Colony of Hong-Kong, it was stated on behalf of the petitioner that the only legal expert available to give evidence of the validity of the marriage, according to the laws and Ordinances of Hong-Kong, demanded a prohibitive fee, the Court gave leave to prove the marriage by reading an affidavit of an ex-Governor of the Colony, who was not a member of the legal profession, but who deposed that he was conversant with the laws and ordinances in force in the Colony.

UNDEFENDED SUIT by wife for restitution of conjugal rights.

The marriage, which was clandestine, was solemnized in the office of the Registrar-General at Hong-Kong by special licence, but the parties never cohabited.

The copy of the marriage certificate (produced) was headed "Hong-Kong Ordinance No. 14 of 1875, Section 23," and after the usual particulars as to the names, ages, condition, and as to the rank or profession of the parties and their respective fathers, it stated that the parties were "married in the Registrar-General's Office by special licence under sections 14–24 of Ordinance of 1875 and section 3 of Ordinance 14 of 1896." The certificate was signed by "J. H. Stewart Lockhart, Registrar-General."

Le Bas, for the petitioner, stated that the only lawyer in this country who could be found to give the necessary expert evidence usually required in such cases had demanded a prohibitive fee of fifteen guineas; and, under these circumstances, he asked to be allowed to give the evidence by an affidavit to be obtained from a former Governer of the Colony, who was now in this country.

GORELL BARNES J. I will accept the affidavit, if the deponent is acquainted with the laws of the Colony. To save expense, I will hear the evidence now in support of the petition, and will then adjourn the further hearing.

1900

COOPER-KING v. COOPER-KING.

Feb. 1. The affidavit of Sir William Robinson, G.C.M.G., formerly Governor of Hong-Kong, in proof of the validity of the marriage of the petitioner and respondent was read to the Court.

The affidavit stated that from the years 1891 to 1898 the deponent was Governor-General of the Colony of Hong-Kong, and that he was well acquainted with the laws relating to British subjects in that Colony; and that from such knowledge he was able to say that a marriage performed in accordance with the statements contained in the original certificate of marriage (produced to the deponent) was a valid marriage. The said certificate would be admissible in the courts of the Colony as evidence of the said marriage.

GORELL BARNES J. That is sufficient. I pronounce a decree of restitution of conjugal rights in the usual form.

Solicitors: *E. F. & H. Landon.*

H. D. G.

1900

Feb. 7.

SMITH *v.* SMITH.
SMITH *v.* SMITH AND CHARLESWORTH.

Divorce—Practice—Consolidated Suits—Petition for Restitution of Conjugal Rights—Answer alleging Adultery—Cross-petition, claiming Dissolution o Marriage—Questions for Jury—Onus probandi—Right to begin.

Where a wife petitioned for restitution of conjugal rights, and the husband in answer alleged that she had committed adultery, and, in a cross-petition, claimed the dissolution of his marriage on that ground:—

Held, that the husband's counsel ought to begin.

MARY SMITH filed her petition on September 25, 1899, alleging that on September 6, 1899, her husband, John Smith, had turned her out of doors without just cause, and refused to allow her to re-enter the matrimonial home, and that he had ever since remained apart from her and still refused without lawful cause to cohabit with her and also to render to her conjugal rights; and she prayed for a decree of restitution.

1900

SMITH v. SMITH.

The husband, John Smith, in his answer, filed on November 18, 1899, denied that he had no just cause for separating and living apart from his wife, and he alleged that the separation was brought about by his wife's adultery; and he prayed the dismissal of the wife's petition and such further and other relief as might be meet.

The wife, in her reply, joined issue upon the first plea; and as to the latter plea, she denied that the separation had been caused by adultery on her part, and she took issue thereon.

The husband, in a cross-petition, filed October 21, 1899, set up the adultery of his wife with a man named Charlesworth, against whom he claimed damages. The husband prayed that his marriage might be dissolved, that the damages might be assessed by a jury, and that he might have such further and other relief as might be just.

The wife and the co-respondent filed answers formally denying the alleged adultery, and asked that the cross-petition might be dismissed.

In the usual course, the suits were consolidated by order dated November 20, 1899, and the questions, as settled by the registrar, were:—

(1.) Whether John Smith, the husband, had just cause for separating and living apart from Mary Smith, the wife.

(2.) Whether Mary Smith, the wife, had committed adultery with Fred Charlesworth, the co-respondent.

(3.) Whether Fred Charlesworth, the co-respondent, had committed adultery with Mary Smith, the wife.

(4.) What amount of damages should be paid by Fred Charlesworth, the co-respondent, in respect of the adultery (if any) by him committed with Mary Smith, the wife.

The pleadings having been opened,

C. F. Gill, Q.C., and *Durley Grazebrook*, for the wife, submitted that the other side must begin.

[THE PRESIDENT. Has the point ever been raised and definitely decided?]

The onus of proof clearly lies on the husband: if he does not establish the charge of adultery against his wife she will

1900

SMITH v. SMITH.

be entitled to the decree for restitution of conjugal rights. The decision in *Cherry* v. *Cherry* (1) really covers the case.

THE PRESIDENT. That seems to be so. I think the husband's counsel should begin in the present case.

Inderwick, Q.C. (*Newson* with him), then proceeded with the husband's cross-petition.

Le Bas appeared for the co-respondent.

In the result, the jury found for the husband, and assessed the damages at 450*l.*

THE COURT thereupon dismissed the wife's petition for restitution; and, upon the husband's petition, pronounced a decree nisi, with costs against the co-respondent; ordered the damages to be paid into court within fourteen days; and made the "usual order" for the wife's costs upon both petitions.

Solicitors for wife: *Williamson, Hill & Co., for Storey & Willans, Halifax.*

Solicitors for husband: *Mann & Crimp, for Joseph Walshaw, Halifax.*

Solicitors for co-respondent: *Bower, Cotton & Bower, for John Marshall, Halifax.*

(1) (1858) 1 Sw. & Tr. 319.

H. D. G.

[IN THE CONSISTORY COURT OF LONDON.]

1899
July 12.

THE VICAR AND CHURCHWARDENS OF ST. BOTOLPH, ALDERSGATE WITHOUT *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—Faculty for Erection of Churchyard Wall with Arcade on disused Burial Ground—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 4, 14—*Meaning of "Building"—Refusal of Faculty for Pictures at East End of Chancel of Parish Church—Discretion—Wishes of Parishioners—Evidence—Memorials.*

A faculty for the erection on a disused burial ground of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels of that side of the wall which would be inside the churchyard, was granted, the Ordinary being of opinion that the wall or structure in question was not a "building" prohibited to be erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887.

Where the vestry of a parish and the petitioners are unanimous, or substantially so, in favour of accepting a presentation picture of merit for the decoration of their parish church, the introduction of the picture into the church may be properly sanctioned by a faculty, unless the picture appears to be likely to be abused by superstitious reverence, or be otherwise inappropriate in a church, or be such as might reasonably give offence to present or future parishioners; but where it was proposed that such a picture should be introduced into the church of an admirably worked parish, and conscientious objections which might be entertained by members of the congregation, without disparagement to the views of others in favour of it, were taken to it as a church decoration by a substantial minority of resident parishioners who were members of the Church of England, and it appeared that its introduction into the church would offend the religious feelings of that minority and introduce discord into the parish where it had never existed before, it was held to be the duty of the Court to refuse to grant a faculty for its introduction.

Instance of a faculty suit in which memorials and counter-memorials signed by parishioners were admitted in evidence by consent.

THIS was a cause of faculty instituted on behalf of the Rev. Henry Reginald Gamble, the vicar, and Dr. John Adams and Charles Bonsall, the churchwardens of the parish church of St.

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ST. BOTOLPH, ALDERSGATE WITHOUT (VICAR OF) *v.* PARISHIONERS OF SAME.

Botolph, Aldersgate Without, in the City and Diocese of London. The suit was brought to authorize by faculty the erection on the parish churchyard, disused for burials under an Order in Council, of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on that side of the wall which would be inside the churchyard; the removal from the east chancel wall of the church of panels on which the Ten Commandments, the Lord's Prayer, and the Apostles' Creed were inscribed, and the introduction into the church in the position occupied by these panels of three pictures, one named "The Dead Christ," and representing our Lord in the tomb of Joseph of Arimathæa, and each of the other two pictures representing an allegorical figure, one of the two pictures being named "Watch" and the other "Pray," and all three pictures being intended to be presented to the parish free of expense.

Appearances in opposition to the grant of the proposed faculty were entered for Thomas Henry Ellis and Benjamin Norman, two of the parishioners, in person.

1899. April 19. On this day the cause came on for hearing before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.). Witnesses were examined in support of the petition with regard to the alterations proposed both in the churchyard and in the church; but before the case had proceeded further the Court adjourned the hearing to enable a meeting of the parish vestry to be properly called, at which the votes of the vestry might be taken with reference to the proposed alterations at the east end of the church. On May 16 last, a meeting of the parish vestry having been duly called and held, the hearing was resumed, and evidence was given on behalf of the opponents.

Richards, Q.C., and *Soper*, appeared for the petitioners.

The opponents appeared in person, but confined their opposition to the proposed alterations at the east end of the church.

The result of the evidence and the arguments of counsel as to whether a faculty should be granted (1.) in respect of the churchyard wall as not being a building within the Disused Burial Grounds Act, 1884 (1), and (2.) in respect of the proposed introduction of the pictures, sufficiently appear from the judgments.

[The following authorities were referred to: 58 Geo. 3, c. 69; *Pierson* v. *Gell* (2); *Clifton* v. *Ridsdale* (3); *Hughes* v. *Edwards* (4); *Phillpotts* v. *Boyd* (5); *In re St. Lawrence, Pittington* (6); *In re St. Mark's, Marylebone Road* (7); Canon 82 of the Canons of 1603.]

Cur. adv. vult.

June 16. DR. TRISTRAM. In the present case the Rev. Henry Reginald Gamble, the vicar, and Dr. Adams and Mr. Bonsall, the churchwardens of the parish of St. Botolph, Aldersgate Without, have applied by petition to the Court to grant a faculty authorizing them to make certain alterations in the churchyard and in the church of this parish.

I will now deliver my judgment as to the proposed alterations in the churchyard, reserving that on the proposed alterations in the church. This churchyard, which, under a faculty granted some years ago, was laid out with great taste as a garden and thrown open to the public, and to which additional ground has since been, by the liberality of the public, added at the cost of 6000*l.*, more than one-third of this sum having been contributed by the Kyrle Society and the

(1) The 3rd section of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), is as follows: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purposes of enlarging a church, chapel, meeting-house, or other places of worship"; whilst the 4th section of the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), provides that in the Disused Burial Grounds Act, 1884, "the expression 'building' in the Act of 1884 shall include any temporary or movable building."

(2) (1762) Parliamentary Papers, 199, Session 1868, Rothery's Return of Causes before the Delegates, p. 85, No. 171.

(3) (1876) 1 P. D. 316; 2 P. D. 276.

(4) (1877) 2 P. D. 361.

(5) (1875) L. R. 6 P. C. 435.

(6) (1880) 5 P. D. 131.

(7) [1898] P. 114.

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Dr. Tristram.

Metropolitan Public Gardens Association, has now with such additional ground become a much-frequented resort for persons resident in the neighbourhood.

The north side of the churchyard is at present separated from Little Britain by houses, which are about to be taken down to widen that thoroughfare. This will necessitate the erection of a churchyard wall to separate the churchyard from the street, and Mr. G. F. Watts, the eminent Royal Academician, has generously offered to decorate this wall with frescoes delineating acts of heroism that have occurred in the humbler classes of life. For the purpose of protecting his frescoes from exposure to the atmosphere, he proposes, at his own cost, to construct a covered way against the wall, with free access to the same from the churchyard and grounds, subject, of course, to his scheme being sanctioned by a faculty from this Court. His offer has been accepted by the unanimous vote of the vestry. The question for the consideration of the Court is, whether this covered way would be a "building" such as is prohibited from being erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887. If it is such a building, it will be the duty of the Court to decline to grant the faculty. If it is not such an one, it will be its duty to grant it.

Sect. 3 of the first Act enacts: [The learned judge read the section, and continued:—] Sect. 14 of the second Act enacts that the Act may be read with the principal Acts (the Metropolitan Open Spaces Acts, 1877 and 1881) as one Act, and the preamble to the second Act recites, "that by the Metropolitan Open Spaces Acts, 1877 and 1881, certain facilities were provided for making available the open spaces and burial grounds in the metropolis for the use of the inhabitants thereof for exercise and recreation, and that it was expedient to provide facilities for making available open spaces and burial grounds in all sanitary districts in England, Wales, or Ireland for the like use of the inhabitants thereof, and to make other provisions for the purpose aforesaid, and also to amend the Metropolitan Open Spaces Act, 1881, and the Disused Burial Grounds Act, 1884"; and s. 4 of the last Act enacts, "that the

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expression 'building'" in the Act of 1884 "shall include any temporary or movable building."

The question that the Court has to determine is whether the proposed structure will constitute a "building," such as is prohibited by these two Acts when read together as one Act from being erected on a closed burial ground. It certainly will not contravene either the letter or the spirit of the second and governing Act, one of its objects being, according to its preamble, to secure to the inhabitants of every parish, ground available for their exercise and recreation, as the site to be covered by this structure will, after its construction, remain as available for their exercise and recreation as it now is, and in inclement weather it will make it more available for such purposes than it is at present. Since the hearing, I have referred to the cases bearing on the construction to be put on the expression "buildings" when used in covenants or in Acts of Parliament. The case nearest in point to the present one is that of *Foster* v. *Fraser*. (1) In that case, part of a residential estate had been sold to the defendant Fraser subject to a covenant that any building to be erected thereon by him or his assigns should be at least thirty-six feet high, and if it faced east should have a stuccoed or cement front, and if north should be pointed with white stock bricks and have a slated roof, and should be used only as a dwelling-house. The defendant leased the land to an advertising company, who erected on it a hoarding from eight to fourteen feet high, which was used as an advertising station. In an action for breach of covenant on the ground of the erection of this hoarding by his lessee, Kekewich J. held that the erection of the hoarding did not constitute a breach of covenant, as the requirement of a stuccoed front or slated roof was not suitable to a hoarding, and that the expression "building" in that case must, therefore, be read in a restricted sense, and not as referable to a hoarding.

The Court is of opinion that as, after the construction of this covered way, the whole of the churchyard will practically remain as much an open space for the exercise and recreation of the inhabitants of the parish as it is at present, and as this

(1) [1893] 3 Ch. 158.

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is really what the Acts aim at, the introduction of the covered way will not contravene their provisions. Moreover, the covered way is intended as a protection for frescoes erected as memorials to meritorious persons, which may be as appropriately and legitimately placed in a disused as in a used churchyard. The Court, therefore, decrees a faculty authorizing the erection of the proposed frescoes, and the construction of the covered way for their protection.

July 12. On this day Dr. Tristram delivered the following judgment in relation to the alterations in the church of St. Botolph which the petitioners sought to have authorized by faculty, and which had not been dealt with in his former judgment in this case.

Cur. adv. vult.

DR. TRISTRAM. In this case an application was made to the Court on the part of the Rev. Henry Reginald Gamble, the vicar, and Dr. Adams and Mr. Bonsall, the churchwardens of the parish of St. Botolph, Aldersgate Without, for a faculty to authorize their making alterations in the parish churchyard, and also at the east end of the parish church.

The case was heard on April 19 and on May 16 last.

As to the first part of the application, which was unopposed by the parishioners, the Court delivered judgment on June 16, and by its decree sanctioned it, reserving judgment on the question raised on the second part of the application in consequence of the question raised by it being a novel one, and of the strenuous opposition offered to it by a minority of the vestry, and by a considerable number of resident parishioners.

The church of this parish had survived the Great Fire of London, but, having fallen into disrepair, it was substantially rebuilt in the latter part of the last century, and some forty years ago was further restored, and with great taste decorated.

It appeared by the petition and in evidence that Mr. Sigismund Christian Herbert Goetze, an artist in London, had generously offered to present to the parishioners for the decoration of the east wall of the chancel of their church three oil

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paintings, one of which he named "The Dead Christ," and the other two "Watch" and "Pray." The first one represents our Lord lying prostrate in an almost nude state in the tomb of Joseph of Arimathæa. This painting had been exhibited in the Royal Academy of last year, and was said to have attracted considerable attention; and it was proposed to place it in the centre of the east wall above the Holy Table. The other two pictures had been painted by him since the exhibition of the first one in the Royal Academy: the one named "Watch" representing a Roman soldier, cased in armour such as was introduced in the Middle Ages; and the one named "Pray" representing a female kneeling in the attitude of prayer. These it was proposed to place one on each side of the central painting.

Mr. Goetze, who was produced as a witness for the petitioners, did not suggest in his evidence that the central painting could be said to represent with historical accuracy the descriptive scene of our Saviour in the tomb, as handed down in Holy Writ, adding that He had been similarly represented in two pictures hanging in the National Gallery, one painted by Francia and the other by Michael Angelo, and that he considered this and the two side paintings as embodying and symbolising Christian truths in a manner fit for the decoration of a Christian church.

To make room for the introduction of these pictures, the Court is asked to sanction the removal from the east chancel wall of panels on which the Ten Commandments, the Lord's Prayer, and the Apostles' Creed are inscribed, which had been erected there forty years ago, the first one in compliance with the requirements of the 82nd canon.

The introduction of paintings into a church for the purpose of decoration is neither prescribed nor prohibited by ecclesiastical law. In the latter part of the last, and in the early part of the present, century it was not unusual for artists of eminence to present pictures painted by themselves descriptive of scenes recorded in Holy Scripture for the decoration of churches with which they were connected, or in which they took an interest.

Some of these paintings have been subsequently sold under

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faculties when it was clear that their retention would interfere with necessary improvements proposed to be made in the church, and the money produced by their sale has been added to the fund provided for making the improvements.

Where the vestry and the parishioners are unanimous, or substantially so, in favour of accepting a presentation painting of merit for the decoration of their church, its introduction might be properly sanctioned by a faculty, unless it should appear to the Court to be likely to be abused by superstitious reverence or to be otherwise inappropriate for a church, or to be such as might reasonably give offence to present or future parishioners.

The question as to whether it was desirable that these pictures should be introduced into the church was submitted to a vestry duly summoned under the direction of the Court given on the first day of the hearing of the suit. The vestry was held on May 11, when fifty-seven ratepayers voted for, and seventeen against, the introduction of these pictures.

At the adjourned hearing of the suit on May 16, memorials signed by 460 parishioners, of whom 113 were said to be resident and 70 non-resident ratepayers, and 122 were members of the congregation, were by consent filed in court in favour of the introduction of the pictures, and a counter-memorial was filed against their introduction signed by 121 resident parishioners, of whom eight were past churchwardens, one an overseer, and two past overseers.

The introduction of the paintings was opposed by Mr. Thomas Henry Ellis in person—a parishioner and ratepayer and past churchwarden, and a member of the common council for the Aldersgate Ward of the City of London. His grounds of opposition were: (1.) The absence of all evidence that the proposed alterations were necessary, or that they would be an improvement to the church; (2.) That their introduction involved the removal from the east wall of the chancel of the Ten Commandments inscribed on a panel and placed there in accordance with the directions of the 82nd canon, as well as of the Apostles' Creed and the Lord's Prayer; (3) That the central painting did not represent with historical accuracy the scene

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of our Saviour in the Tomb as handed down in Holy Writ, as in the painting our Saviour was represented in what appeared to be an almost nude state, instead of being wrapped in linen; and the two angels watching over Him were represented as being in female form attired in colours, instead of as men clothed in white; and that the soldier in the picture called "Watch" was not attired as a Roman soldier would be guarding our Saviour's tomb, but in plate armour such as was first introduced in the Middle Ages; (5.) That the introduction of the oil paintings would not harmonize with the existing stained glass windows and painted panels that have been in the church since 1788; (6.) That the vicar had done a great deal of good work in the parish since he had come into it, had increased the congregations, and had worked harmoniously with the parishioners, but that the introduction of the pictures into the church would be offensive to many parishioners who were staunch supporters of the Church, and would introduce a bone of contention into the parish where there had been none before.

Four witnesses, including Mr. Ellis, were examined in support of his case, as well as Mr. Benjamin Norman, an architect and surveyor, who had lived in the parish all his life, and had been churchwarden from 1892 to 1898.

It appears that between 1892 and 1894 the City of London Parochial Charity Commissioners were prepared, under the advice of their architect, Mr. Christian, to expend such sum as he might advise them was necessary to put the fabric and fittings of this church in substantial and complete order, and Mr. Norman and his co-churchwarden, Mr. John Holliday, who is a signatory to the counter-memorial, considering it to be their official duty to ascertain what, if any, alterations were to be made in the church, met Mr. Christian and the late vicar in the church for that purpose, and that on Mr. Christian being asked by Mr. Norman what his intentions were, Mr. Christian's answer was, "That he did not intend to make any alteration in the decoration of the apse or church. That he considered the decorations to be very beautiful, and that it would be a sin to alter them. All that he intended doing in regard to the

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grain work and other decorations was to clean and varnish them," and that was all that was done. Three other witnesses were also examined, namely, Mr. Lane, a parishioner and ratepayer, a stained glass artist and an amateur in art, and a judge of pictures, Mr. William Morgan, a non-parishioner, an expert in paintings and fine art, having studied art for twenty years and having visited every picture gallery in Europe and North America, and who had exhibited specimens of his own paintings at the Manchester Exhibition, and Mr. Christopher Elliot, a parishioner and ratepayer for many years; and their evidence may be thus summed up and be taken as expressive of the opinion of the 121 signatories to the counter-memorial—namely, that they would have offered no objection to the central picture as an appropriate decoration in a church had it contained an historically accurate representation of our Saviour in the Tomb, but that as it was not such a representation, and more particularly as it exhibited our Savour's body in almost a nude state and in such a state as in their opinion did dishonour to His body, they objected specially to its introduction as a church decoration. They also objected to the removal of the tablet with the Ten Commandments inscribed upon it to make room for the painting, and offered, if the letters were not sufficiently large to enable the Commandments to be read at a distance from the apse, to subscribe for the substitution of a new tablet in larger type, and contended that the fact that similar representations of the Entombment of our Lord painted in the fifteenth century, when the Bible was a sealed book to the laity, were hung in the National Gallery, afforded no argument in favour of the introduction of such a painting into an English church. Mr. Ellis in his evidence stated that he was born in the parish, that his father had resided in the parish for fifty years and had been churchwarden of the parish; that his mother was the owner of property, and lived in the parish, and was a regular attendant at the services of the church; that he had two brothers in business in the parish, and that his views were expressive of those of the 121 signatories to the counter-memorial, in which all members of his family cordially concurred.

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Mr. Richards, as counsel for the petitioners, in reply submitted that the real question in issue was one of artistic taste, and that I do not sit in this Court to decide on questions of taste, but that my decision should be in accord with the views of the majority of the vestry and of the majority of the residents of the parish, as expressed by the vote of the vestry and the memorials filed by the petitioners, and as it was not suggested that the paintings were liable to be used superstitiously, they were lawful decorations.

With regard to the memorials filed by the petitioners, they are open to this observation, that of the 460 signatures to them, one hundred are the signatures of members of the same family placed after the signature of the head of the family, and that upwards of fifty of those who signed are marksmen.

Having inspected the church, I agree with Mr. Christian that it is so tastefully decorated as not to require alteration. Whether or not the introduction of paintings in the apse would or would not be an improvement, it is no part of my duty to determine in the present suit.

The Court is of opinion that the objections taken to these paintings as church decorations, and in particular to the central one, may be conscientiously entertained by members of any congregation in a church without disparagement to those who may entertain a view favourable to them. As from the evidence the Court is satisfied that no less than 120 resident parishioners and churchmen, eight of them being past churchwardens, conscientiously object to their introduction, though it be on a matter of taste, and that their introduction would offend their religious feelings and would introduce discord into an admirably worked parish where there has been none before, it feels in the exercise of its judicial discretion that its duty is to decline to sanction their introduction by faculty. The Court in coming to this decision desires to add that it is far from its intention to depreciate Mr. Goetze's generosity in offering to present the paintings for the decoration of the church, and that the vicar and churchwardens, having regard to the vote of the vestry and the feeling of a strong party in the parish in favour of their introduction, were acting well within their duty

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in submitting the question in dispute to the Court by applying for this faculty.

As Mr. Ellis appeared and conducted his case in person, the Court will make no order as to costs, leaving each party to pay their own costs.

Solicitor for petitioners: *M. R. Webb.*

C. F. J.

1899
Aug. 12.

[IN THE CONSISTORY COURT OF LONDON.]

KENSIT AND OTHERS *v.* THE RECTOR AND CHURCHWARDENS OF ST. ETHELBURGA, BISHOPSGATE WITHIN.

Ecclesiastical Law—Faculty—Interest requisite for Promotion of Faculty Suit—Parishioners having Names on Rate-book—Ornaments of the Church—Architectural Decorations—Crucifixes—Ornaments Rubric—3 & 4 Edw. 6, *c.* 10—*Refusal of Confirmatory Faculty—Churchwardens—Undertaking to Replace Tables of Commandments—Canon* 82 *of Canons of* 1603.

A crucifix is neither a lawful church ornament nor an architectural decoration the retention of which in a church can be authorized by faculty, and where a crucifix has been introduced into a parish church the Ordinary has jurisdiction to direct its removal by the churchwardens without proof that it is likely to have superstitious reverence paid to it.

A parishioner of a parish in the City of London whose name is on the rate-book as occupier of a room in the parish taken solely to enable him to bring a civil suit in the court, has a sufficient interest to promote a cause of faculty to obtain the removal of unlawful church ornaments out of the parish church of the parish of which he is a parishioner.

The curate in charge of a parish in which the incumbent was non-resident introduced into the parish without lawful authority two crucifixes, one a movable crucifix of brass about eighteen inches high placed on a Tabernacle for the Reserved Sacrament standing on the Retable in the chancel of the church, and the other a crucifix three feet in height affixed to the north wall of the church by the side of and slightly above the level of the pulpit; and during his tenure of office, from about 1880 to 1894, there were in the church, besides these crucifixes and Tabernacle, a censer and the Stations of the Cross; incense was used in the church, and during the Communion Service the wine was mixed with water. Between 1894 and 1898 a succeeding curate, the crucifixes and Tabernacle still remaining in the church, introduced there a picture of the Virgin Mary, and the next year a shrine to the Virgin Mary called an "Altar of Repose," and a

statue of the Madonna and Child; and services were conducted in the church in which the crucifixes were used by the minister and members of the congregation for superstitious purposes. Afterwards an application was made by three parishioners for a faculty to authorize the removal of the crucifixes out of the church, and the incumbent and churchwardens appeared as opponents, and prayed for a confirmatory faculty for the retention of the crucifixes.

It appeared that several past churchwardens and many of the parishioners had disapproved of and protested against the introduction and retention of the crucifixes, and that in 1898 another curate in charge had been appointed, whilst there was no evidence that during the time he had been the officiating minister the crucifixes had been used superstitiously.

It further appeared that before the hearing of the suit the Tabernacle for the Reserved Sacrament had been removed out of the church :—

Held, that the Court must refuse the prayer for a confirmatory faculty, and issue a faculty directing and authorizing the churchwardens as officers of the Ordinary to remove the crucifixes out of the church, because—first, they were either in themselves illegal church ornaments or illegal architectural decorations; and, secondly, if not in themselves illegal as church ornaments or architectural decorations, they were—having regard to the facts that they were introduced into the church for superstitious purposes, and were so used for nearly twenty years, and might be so used again, and had been a cause of offence to several churchwardens and parishioners, some of whom, though supporting a resolution of vestry against the petitioners, did not thereby express any opinion for their retention—articles and things the retention of which in the church it would be an unwise exercise of the discretion of the Court to authorize.

Semble: A Tabernacle for the reception of the Reserved Sacrament is not a lawful church ornament.

THIS was a cause of faculty instituted on behalf of John Kensit, Daniel Hone, and Herbert Charles Hill, described in the petition in the suit as "all of 79, Bishopsgate Street, in the parish of St. Ethelburga, in the City and Diocese of London," and promoted for the purpose of obtaining a faculty authorizing (1.) the removal out of the parish church of St. Ethelburga, Bishopsgate Within, of two crucifixes and a Tabernacle on which one of the crucifixes stood: all of which articles or things had been introduced into the church without the sanction of a faculty, and (2.) the placing of the Ten Commandments at the east end of the church.

After the petition in the suit had been filed the petitioners became aware that the Tabernacle which they sought to have removed had been removed out of the church, and that a solid

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pedestal of wood had been substituted in its place. An amended petition was accordingly filed on their behalf on January 30, 1899. The four first paragraphs of the amended petition were, so far as material to this report, in terms as follows:—

1. Your petitioners are each of them parishioners and ratepayers in the said parish of St. Ethelburga.

2. There was in the church of the said parish on a ledge, or what appears to be a wooden overmantel at the back of and over the Communion Table, a thing called a "Tabernacle." This Tabernacle appeared to be constructed of wood. It had a cross on or forming a part of the door thereof. The Tabernacle was about sixteen inches high, ten inches wide, and ten inches deep. The Tabernacle was formerly, it is believed until about January, 1898, used for the reception and storage of a consecrated wafer or the reserved elements, which have been known as The Host. This Tabernacle was, unknown to your petitioners at the time the petition was presented, removed, and has been replaced by a pedestal of similar appearance and dimensions as the Tabernacle.

3. There is over the Communion Table in the said church, and resting upon the top of the said pedestal or structure, a movable crucifix of brass, and the figure thereon is of brass. The height of the crucifix is about eighteen inches, and the breadth at the arms about eight inches. The figure is about four inches in height.

4. Near the pulpit in the said church is a large crucifix. The cross is about three feet in height and about eighteen inches in breadth at the arms. The figure on this crucifix is about one foot in height. The cross portion of the crucifix is of black wood. This crucifix is in a conspicuous position on the north wall of the church just above the level of the pulpit. It is affixed to the wall apparently by a nail.

The petition further alleged that all the above-mentioned articles and things had been placed in the church since the consecration thereof, and without any faculty, were illegal and illegally placed in the church, and were liable to, and in fact had been subjected to, superstitious uses; that the petitioners

prayed that a faculty might issue to them, or to such person or persons as the Court might select, authorizing, and if need be requiring them, him or them, to remove all the above-mentioned articles and things out of the church, and that, the Ten Commandments formerly set up in the church having been removed, and the petitioners being ready and willing to pay the costs of setting them up at the east end of the church, a faculty should be granted to them or some other person or persons for that purpose.

Appearances as opponents were entered for the Rev. John Meadowes Rodwell, the rector of the parish of St. Ethelburga, and Charles Farris and Edwin Frederick Fitch, the churchwardens of the same parish, and on their behalf, on February 18, 1899, an amended answer was brought in which alleged that the petitioners were not bonâ fide parishioners of St. Ethelburga, but residents and parishioners of other parishes —were tenants of a small office in a house in the parish of St. Ethelburga, taken by them in 1898 to secure a nominal qualification as parishioners for the purpose of interfering in the affairs of the parish and church, and of instituting the suit, the office or room so taken by them being neither used by them either as a residence or for the purpose of business, nor furnished, nor in fact made any use of; were not bonâ fide worshippers at the church of St. Ethelburga, and on divers occasions when attending the services there they or some of them had created disturbances thereat, and had annoyed and molested the clergy officiating there, and the congregation by their disorderly and irreverent behaviour.

After denying that there was in the church any Tabernacle, and admitting that there was there a crucifix resting upon part of the woodwork and superstructure on the back of and above the Holy Table, neither crucifix nor woodwork resting upon, touching, or forming part of the Holy Table, and another crucifix placed as described in paragraph 4 of the amended petition, the amended answer further alleged that each of the crucifixes had been in its present position without protest or objection for more than twenty years; that all the articles

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referred to in the petition then in the church were legal and proper ornaments, did not offend against the laws ecclesiastical, and had not been in fact, and were not liable to be, subjected to superstitious uses; that the objects of the petition were contrary to the wishes of the parishioners and of the congregation worshipping at the church, and that a resolution of the vestry of the parish had been passed on October 13, 1898, whereby it had been unanimously resolved—firstly, that this vestry meeting desired to record its disapproval and deep regret at the proceedings taken by Messrs. Kensit, Hone, and Hill against the rector and churchwardens of the parish; secondly, that this vestry meeting hereby requests the rector and churchwardens to resist the proceedings taken by Messrs. Kensit, Hare, and Hill, and to act in any way they may think best in the interests of the parish church, and to retain the rights and privileges of the parishioners.

As to the allegations in the amended petition with reference to the Ten Commandments, the amended answer contained statements that they had been removed about October, 1897, for the purpose of being renovated, and the respondents intended to replace and set them up in a proper position in the church, and that the costs of replacing them and setting them up had already been provided for from proper sources.

By the prayer of the amended answer the Court was asked to reject each and every prayer of the amended petition.

May 17, 18, 19; June 2, 17, 30. On these days the cause was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.). On the first four days of the hearing witnesses for the petitioners and the opponents were examined orally in court. The result of their evidence, as well as of a witness who was recalled on the last day of the hearing, appears from the judgment.

Greene, Q.C., and *Whitehead* (*Danckwerts* with them), appeared for the petitioners.

Jelf, Q.C., *Richards, Q.C.*, *Hardy*, and *Soper* appeared for the opponents, and on their application by leave of the Court

the amended answer was further amended by averments that, if it should appear to the Court that any of the ornaments referred to in the amended petition had been placed in the church of St. Ethelburga without sufficient or lawful authority, the respondents submitted that they are legal and proper ornaments for the church, and that a confirmatory faculty should be granted for their retention, and by a prayer praying that such a confirmatory faculty should issue.

Greene, Q.C., and *Whitehead*, for the petitioners. The petitioners ask for a faculty or faculties to remove the two crucifixes and the pedestal now substituted for the Tabernacle, and to set up the Ten Commandments at the east end of the church; and they have a right to institute this suit and ask for this relief by reason of their having the interest required for that purpose, namely, the interest of parishioners of St. Ethelburga: *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (1); *Lee* v. *Fagg*. (2) They come within the definition of parishioners according to the cases of *The Attorney-General* v. *Parker* (3); *Etherington* v. *Wilson* (4); *Batten* v. *Gedye* (5), having become tenants of premises in the parish, having their names on the rate-book, and being indirectly if not directly liable for the rates and other liabilities of parishioners. There is absolutely no authority for the contention that the right to bring a faculty suit in respect of this parish church is confined to bonâ fide worshippers or to members of the congregation of St. Ethelburga. All the parishioners have a right to attend the services of their parish church, and this right has been recognised from the earliest times: *Corvin's Case* (6); *Halliday* v. *Phillips*. (7) No doubt the petitioners became parishioners for the purpose of taking these proceedings, but their motive for doing so is quite immaterial. Whatever be their motives, they have acquired a right to set the ecclesiastical law in motion in this case.

Search has been made, but no record of any faculty

(1) (1878) 4 P. D. 46.
(2) (1874) L. R. 4 A. & E. 135; L. R. 6 P. C. 38.
(3) (1747) 3 Atk. 577.
(4) (1875) 1 Ch. D. 160.
(5) (1889) 41 Ch. D. 507.
(6) (1604) 12 Rep. 105.
(7) (1889) 23 Q. B. D. 48, at p. 57.

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authorizing the introduction of crucifixes in St. Ethelburga's has been found. It is clear from what took place at the services held there that from the time of the introduction of the crucifixes until the appointment of the present curate in 1898 the crucifixes were both liable to superstitious reverence, and had in fact superstitious reverence paid to them; so that the Court in its discretion should on that ground alone refuse to authorize their retention in the church: *Phillpotts* v. *Boyd* (1); *Clifton* v. *Ridsdale* (2); but it is submitted that an isolated crucifix is in itself unlawful, a presumption of law existing that it is likely to have superstitious reverence paid to it. This submission is borne out by the decision of this Court in the St. Mark's, Marylebone Road, Faculty case—*The Vicar and Churchwardens of St. Mark's, Marylebone Road* v. *The Parishioners of the Same* (3) —where the Court ordered four crucifixes to be removed, and the dicta of the Judicial Committee of the Privy Council in *Westerton* v. *Liddell* (4) and *Clifton* v. *Ridsdale* (5): see also *Durst* v. *Masters* (6) and *Reg.* v. *The Bishop of London* (7); and is either supported by or not in conflict with the decision of the Arches Court authorizing the compartment of a reredos consisting of the representation of the Crucifixion in *Hughes* v. *Edwards* (8), and the more recent judgments of the Consistory Courts with reference to reredoses, screens, and roods in the cases of *In re St. Lawrence, Pittington* (9); *In re St. Ethelburga* (10); *The Vicar and Churchwardens of St. John's, Pendlebury* v. *The Parishioners of the Same* (11); *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors of the Same* (12); *The Vicar of Richmond and the Chapelwardens of St. Matthias, Richmond* v. *All Persons having Interest* (13); *The Vicar and Churchwardens of Great Bardfield* v. *All having*

(1) (1875) L. R. 6 P. C. 435.
(2) (1877) 1 P. D. 316; (1877) 2 P. D. 276.
(3) [1898] P. 114.
(4) (1855) Moore's Special Report, at p. 175.
(5) (1877) 2 P. D. 276, at pp. 351–353.
(6) (1875) 1 P. D. 123, 373.
(7) (1889) 24 Q. B. D. 213; [1891] A. C. 666.
(8) (1877) 2 P. D. 361.
(9) (1880) 5 P. D. 131.
(10) (1878) Tristram's Reports, 69.
(11) [1895] P. 178.
(12) [1895] P. 71.
(13) [1897] P. 70.

Interest (1); *The Rector and Churchwarden of Barsham* v. *The Parishioners of the Same.* (2) Indeed, an isolated crucifix has never been declared to be lawful in churches of the Church of England, and has never been legalised by any binding authority. Moreover, the statute 3 & 4 Edw. 6, c. 10, is still in force against isolated images, and whatever may be found in the books with reference to its provisions being spent has only reference to the prohibitions therein contained as to groups of images, which, if not abused or likely to be abused, are permissible: Hook. Church Dictionary, voce Image. The pedestal now substituted for the Tabernacle in St. Ethelburga's Church was placed there without a faculty, and can serve no lawful purpose; the Court ought, therefore, in its discretion not to authorize its retention in the church. As to the Ten Commandments, the provisions of canon 82 of the Canons of 1603 require that they should be set up at the east end of the church, and the Court ought to order this to be done.

[They also referred to *Combe* v. *Edwards* (3); 58 Geo. 3, c. 69, s. 3; 59 Geo. 3, c. 85, s. 1.]

Jelf, Q.C., *Hardy*, and *Soper* (*Richards, Q.C.*, with them), for the opponents. Two of the more important questions to be decided are—first, are the crucifixes now in the church of St. Ethelburga illegal in themselves? and, secondly, if not illegal in themselves, are they illegal by reason of their position and their present surroundings? With reference to this second question, it is immaterial what were the ornaments or services in use in the church at a period anterior to the appointment of the present curate in charge, and, in order to apply the test of legality or illegality laid down in *Phillpotts* v. *Boyd* (4), and determine whether these crucifixes have been or are likely to be the subjects of superstitious use, their present position and surroundings ought alone to be considered. This being so, it is clear that there is an absence of any evidence that superstitious reverence has been or will be likely to be paid to them.

[DR. TRISTRAM. The Court is of opinion that the petitioners are entitled to give evidence of any superstitious observances in

(1) [1897] P. 185.
(2) [1896] P. 256.
(3) (1877) 2 P. D. 354.
(4) L. R. 6 P. C. 435.

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connection with these crucifixes since their introduction into the church up to the present time.]

At any rate, it is most material that under the present curate there has been an entire change in the former surroundings of these crucifixes, and whatever might have been objectionable to the petitioners in the services held in the church before his appointment has now been discontinued. There is then the question whether the petitioners have really the status which alone can entitle them to take these proceedings. The case is one primæ impressionis. The petitioners have really no such interest as is required by ecclesiastical law. They will not in the least degree be affected by whatever decision the Court may give. And, even if they have a mere technical interest in law, the Court, in considering in its discretion whether the crucifixes should remain, ought to give no practical weight to their views in opposition to those of the majority of the parishioners, who are satisfied with the present state of affairs. The opponents contend that the Court must exercise this discretion in this case, for the rule in *Phillpotts* v. *Boyd* (1) applies to all images in churches whether they form part of an historical group or are isolated historical figures, as these and all crucifixes are; and, therefore, the question whether the crucifix is out of the rule and is in itself illegal must be answered in the negative. There is, in fact, no decision binding on the Court that a crucifix which has not been abused and is not likely to be abused is an unlawful church ornament. There is not in force any statute, canon, or ordinance declaring the illegality of crucifixes. The Ornament Rubric of the Prayer Book has no application to crucifixes; and it is clear from the observations of the Judicial Committee of the Privy Council in *Phillpotts* v. *Boyd* (1) and *Westerton* v. *Liddell* (2) that the efficacy of the 3 & 4 Edw. 6, c. 10, relating to images is spent. The Court ought to grant the opponents a confirmatory faculty for the retention of the crucifixes and the pedestal, for the burden of proving the illegality of the crucifixes rests upon the petitioners, and has not been discharged, inasmuch as none of the cases relied on by the petitioners in support of their submission that

(1) L. R. 6 P. C. 435. (2) Moore's Special Report, p. 171.

crucifixes per se are illegal contain even any clear expression of opinion much less any actual decision, on the point.

[They also referred to *Subcoat* v. *Butler* (1); *Serjeant* v. *Dale*. (2) The Injunctions of Edward VI., item 3, item 28; Cardwell's Documentary Annals, pp. 7, 17; Latimer's Remains, p. 233; Archbishop Cranmer's Works, vol. ii. p. 101; *Butt* v. *Jones* (3); Harold Browne On the Thirty-nine Articles, 532; Blunt's Theological Dictionary, voce Image Worship.]

Greene, Q.C., replied.

Aug. 3. *Greene, Q.C.*, and *Whitehead*, on behalf of the petitioners, applied to the Court for leave to amend the amended petition by inserting therein a statement to the effect that the petitioners had on June 24 last become tenants of the basement of 59, Bishopsgate Street, in the parish of St. Ethelburga, at a yearly rent, their tenancy of the room taken by them in 79, Bishopsgate Street having expired on July 12 last.

Hardy appeared for the opponents.

[The creation of the new tenancy and the entry of the petitioners' names on the rate-book in respect of the same were proved by one of the petitioners and another witness, who had made affidavits in support of the application and attended to be cross-examined on their affidavits; and, after hearing their cross-examination on behalf of the opponents, the Court granted the application to amend, the requisite amendment being afterwards made.]

Cur. adv. vult.

Aug. 12. DR. TRISTRAM. The Court is asked by the petitioners in this case, Mr. John Kensit, Mr. Daniel Hone, and Mr. Herbert Charles Hill, as parishioners of the parish of St. Ethelburga, in the City of London, to issue a faculty authorizing the removal from the parish church of St. Ethelburga of a movable crucifix of brass, placed on a pedestal standing on the retable in the chancel of the church; also of

(1) The Church Intelligencer for Dec. 1898.

(2) (1875) Tristram's Reports, 33.

(3) (1829) 2 Hagg. Eccl. 417, at p. 424.

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a crucifix 3 feet in height and 18 inches in breadth, affixed in a conspicuous position by a nail to the north wall of the church, by the side of and just above the level of the pulpit, both of which crucifixes were placed in the church without any faculty and are liable to be, and have in fact been, subjected to superstitious uses.

The respondents, the Rev. James Meadowes Rodwell, rector, and Mr. Charles Farris and Mr. Edwin Frederick Fitch, churchwardens of the parish, in their amended answer to the petition, allege that the petitioners are not bonâ fide parishioners of the parish, and merely took a room or office in the parish early in 1898 to secure a nominal qualification as parishioners for the purpose of interfering in the affairs of the said parish and church and of instituting these proceedings. They admit that the two crucifixes are in the church, as alleged by the petitioners, but aver that they have been there without protest and objection for more than twenty years, and that they are legal and proper ornaments and do not offend against the laws ecclesiastical. They further deny that they have been in fact or are liable to be subjected to superstitious uses, and pray the Court, if it should appear to it that the crucifixes have been placed in the church without lawful authority, to grant a faculty confirming and authorizing their retention in the church.

Before proceeding to consider the questions of law raised on the pleadings, it will be convenient that I should state briefly such facts relating to the parish and to the manner in which the services have been conducted in the church during the last twenty years as may have a bearing on the questions submitted to the Court for its determination. The parish contains only sixty houses, with a resident population of 160, most of whom are caretakers. The income of the rectory is 1070*l.* per annum, derived principally from house tithes. Mr. Rodwell has been rector for fifty-six years, and owing to failing health and age has been non-resident for twenty years and upwards; and since he became non-resident the ministrations of the parish and the sole control of the services in his church have been entrusted by him to a curate in charge. Some

nineteen years ago Mr. Eldred became curate in charge, and remained so for fourteen years; and during his tenure of office he introduced into the church without the sanction of a faculty the following ornaments: a Tabernacle on the retable for the reception of the Reserved Sacrament; and on the Tabernacle a movable crucifix; and by the side of the pulpit another crucifix suspended from the north wall of the church; a censer; and the Stations of the Cross. Mr. Nix, a parishioner who had known the parish for forty years, recollected Mr. Eldred coming as curate. He was churchwarden for seven years during Mr. Eldred's tenure of the curacy, and protested to him against the use of incense, the Stations of the Cross, the mixing of water and wine during the service, and the crucifixes; and two of his co-churchwardens, Mr. Bollemoré and Mr. Mercer, joined with him in objecting to the crucifixes. He objected to high Ritualistic services, and so seldom attended his parish church. Shortly after Mr. Eldred's death, which occurred some five years ago, the Rev. Wilmot Phillips became curate, and remained so for four years, up to January 10, 1898.

Mr. Frederick Bickford Heard, who had been a regular attendant at Ritualistic churches from the age of ten to eighteen years, but had since from conviction become a Nonconformist, stated that he frequently attended the services at St. Ethelburga on week-days between May, 1896, and April, 1898; that in May, 1896, being the month devoted by the Roman Church to the Virgin Mary, Mr. Phillips introduced into the church a picture of the Virgin Mary decked with blue and white ribbons, in accordance with the practice of the Roman Church. On Maundy Thursday, 1897, he observed that a shrine to the Virgin Mary, called the Altar of Repose in the Roman Church, was erected in the church on the right side of the chancel, and that a statue of the Madonna and Child had been substituted for the picture of the Virgin Mary, and that the shrine and image were covered with a violet veil. He attended the service on Good Friday, 1897, when there were notices on the church door of an Altar Service, the Mass Presanctified, and the Adoration of the Cross. There had then been placed a ciborium or Tabernacle containing the Reserved Sacrament,

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with thirty lighted candles, on the Altar of Repose on that day. Mr. Phillips came into the church accompanied by two acolytes, and they all three fell prostrate before the High Altar. The service was the Mass Presanctified. The witness followed it from a book which he had containing the service. There were about fifty persons present. After reading some passages of Scripture Mr. Phillips offered up a prayer for the Pope and then preached a sermon, and at its conclusion said, "Presently I will place a crucifix on the altar steps and will invite you to come up in adoration and kiss the feet of the figure of our Lord on the Cross." He said the priest would do it first, then the choir, and then the congregation. He then offered another prayer for the Pope and one or two more prayers, and then proceeded to the veiled crucifix over the altar, whilst one of the acolytes proceeded to a veiled crucifix standing within the chancel, and the other acolyte to the veiled crucifix by the pulpit. Mr. Phillips then lifted up the veil of the altar crucifix and said, "Behold the wood of the Cross on which hung the Saviour of the world." The acolytes then lifted up the veils of the other two crucifixes. This they all did three times, and then the figures were completely unveiled. Mr. Phillips then placed two cushions inside the chancel gates, and, having placed the altar crucifix on them and made three approaches to the crucifix, prostrating himself three times with outstretched hands, kissed the feet of the figure of our Lord. The acolytes and choir having done the same, the crucifix was brought to the end of the chancel on the cushions, and, a plate having been put beside it for free-will offerings, all the congregation excepting the witness and another lady and gentleman prostrated themselves before the crucifix, and with outstretched hands kissed the feet of the crucifix. Subsequently every member of the choir carried a lighted taper to the Altar of Repose, and prostrated themselves before it; then Mr. Phillips took the ciborium containing the Host and held it up for a moment, after which censing took place, and Mr. Phillips took out the wafer from the ciborium and ate it; and he then prayed to the Virgin Mary and to John the Baptist and gave the Benediction. The witness attended the Saturday

morning service of Blessing the Pascal Candles and the Holy Fire. This service is to be found in the Roman Catholic services for the Holy Week, the prayers of which were read by Mr. Phillips. He also attended on Wednesday evening, December 15, 1897, when Mr. Phillips came into the church followed by Father Saunderson. Father Saunderson genuflexed to the Tabernacle, and then proceeded to the pulpit. After he had finished his sermon he raised his biretta to the crucifix, bowed his head to it and crossed himself. The witness had seen Mr. Phillips pay reverence to the crucifix in like manner on going into and out of the pulpit.

Another witness, Mr. Sims, stated that he attended services at this church frequently in 1897 and in January, 1898, and that he had noticed Mr. Phillips raising his biretta to the crucifix and bowing slightly towards it up to January 9, 1898, and he had noticed the congregation also bowing to it.

The most material question raised at the hearing of this case was, whether an isolated crucifix is a legal church ornament.

Mr. Jelf, as counsel for the respondents, submitted that it would be, provided that it was not used for superstitious purposes, and that there was no reasonable probability of its being so used. He rested his submission on three grounds: First, that it had not been declared to be ex necessitate an unlawful church ornament by the judgment of any court, ecclesiastical or civil, in which the issue as to its legality had been directly raised. Secondly, that it had not been so declared by any statute, or by any ecclesiastical constitution or injunction, or by any canon of the Church. Thirdly, that as it might be used in the services of the church for innocent as well as for superstitious purposes, where the parish vestry by a preponderating vote signified its wish that a crucifix should be introduced into the parish church, or, if one had been introduced into it, that it should be retained there, an Ecclesiastical Court might properly give its sanction to its introduction or retention there by a faculty, unless it was satisfied that there was a reasonable probability that it would be used for superstitious purposes.

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Mr. Greene neither in his opening nor in his reply referred the Court to any such case in which a decision as to whether an isolated crucifix was unlawful in itself had been given, and as far as my research has gone I have found none.

The question, however, whether a crucifix was or was not a lawful church ornament came under the consideration of Dr. Lushington in the cases of *Westerton* v. *Liddell* (1), relating to certain church ornaments in St. Paul's, Knightsbridge, and of *Beal* v. *Liddell* (2), relating to certain church ornaments in St. Barnabas, Pimlico, heard before him in this court, as necessarily incidental to the consideration and determination of one of the issues raised in those suits—namely, whether a cross was or was not a lawful church ornament. On appeal the same question was subsequently under the consideration of Sir John Dodson in the Arches, and of the Judicial Committee of the Privy Council, and on reference to the judgments delivered in these three courts it will appear to have been severally accepted by them, as admitted law, that a crucifix is not a lawful church ornament. In St. Paul's, Knightsbridge, a wooden cross had been affixed to the Holy Table, and in St. Barnabas, Pimlico, a large metal cross adorned with jewels was affixed to a super-altar forming part of a stone altar, which had been erected in lieu of a Communion Table of wood, and there was affixed on the top of the chancel screen a large cross of carved wood.

The contention of Mr. Westerton and Mr. Beal's counsel was that crosses equally with crucifixes were unlawful church ornaments, on the ground that crosses, though in a less degree, had been prior to the Reformation used in the services of the English Church, as they still are in the Roman Church, for superstitious purposes, and that both were, therefore, on that ground ordered to be removed from all churches and to be destroyed by the Royal Injunctions of Edward VI. issued in 1547, and by a proclamation of Edward VI., both of statutable authority, and by 3 & 4 Edw. 6, c. 10—crucifixes expressly as images, and crosses under general words, as ornaments that had been used for superstitious purposes. Dr. Lushington doubted

(1) Moore's Special Report. (2) (1855) Moore's Special Report.

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as to whether the terms in the Injunctions and of the statute of Edward VI. were sufficiently explicit to include crosses, but, being of opinion that the legitimate inference from contemporaneous and continuous evidence extending over three centuries was that crosses were not ornaments of the church in use in the second year of Edward VI., he held that they were not lawful church ornaments under the Ornament Rubric of 1662, and ordered the cross to be removed from the chancel screen in St. Barnabas, and the crosses to be removed from the Communion Table in St. Paul's, Knightsbridge, and from the super-altar in St. Barnabas.

On appeal to the Arches, Sir John Dodson affirmed Dr. Lushington's judgment. The Judicial Committee on appeal affirmed the orders of Dr. Lushington for the removal of the cross from the Communion Table in St. Paul's, Knightsbridge, and from the super-altar in St. Barnabas, but reversed the order for the removal of the cross from the chancel screen in St. Barnabas on the ground that the word "ornaments" in the Rubric of 1662 applies, and is confined to those articles the use of which is prescribed by the First Prayer Book of Edward VI., and does not include articles of decoration and embellishment, and that the cross, having been erected on the screen as an architectural decoration, there was no objection in ecclesiastical law to its remaining there. On the question of the legality of introducing a crucifix into a church, Dr. Lushington made the following observations: "What can be more innocent in itself than the figure of our Saviour on the Cross, in whatever material it may be exhibited? . . . I might say with truth, what more likely to remind the pious of the great sacrifice made for their redemption? It is admitted on all hands that the crucifix is prohibited. Why? What great and powerful motive dictated the prohibition of that which was in itself not only innocent, but might be auxiliary to devotional feelings? Is not the answer clear? The crucifix had been abused. It might be abused again to superstitious notions. And what did our ancestors do in apprehension of the abuse? Prohibit what might be abused, and what might again lead to the commission of the same errors. And on what foundation did they build their

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inference? For what all-powerful reason did they reject the common argument, that the abuse of any custom, article or thing in itself indifferent, or even capable of good, is no sufficient reason for its extinction, but rather for its regulation to a profitable use? The fear that superstitious practices might thereby be revived." (1) Sir John Dodson relied in the main on the Injunctions of Edward VI., issued in 1547, as the authority for prohibiting the introduction of crosses as church ornaments. He said: "The object of those Injunctions clearly was to take away those images and other ornaments not essentially necessary to divine worship which had been abused," and expresses the opinion that if the cross was not an image, it was prohibited by the Injunctions indirectly as coming under the description of a monument of idolatry and superstition. (2)

I have already stated that the ground on which the Judicial Committee sanctioned the retention of the cross on the chancel screen in St. Barnabas was that it was an architectural decoration and not a church ornament, and therefore did not come within the purview of the present Ornaments Rubric.

The Court was not asked by Mr. Jelf to sanction the retention of these two crucifixes as architectural decorations, but as church ornaments to be used by the congregation as aids to their devotion during the services of the Church, and to be used by the preacher to enable him, by directing their attention to the figure of our Saviour on the Cross present in the church, to bring more vividly before their minds the great sacrifice made by Him on the Cross for their redemption.

If it is a church ornament, then, as I stated in my judgment in *White* v. *Bowron* (the Baldachino case) (3), "If it is a church ornament, unless it is such an ornament as comes within the provisions of the Ornament Rubric of 1662, or would be subsidiary to the services of our Church as prescribed by law, it is not competent to this Court to grant a faculty for its erection. The Ornament Rubric is in these words: 'And here it is to be noted that such ornaments of the church, and of the

(1) Moore's Special Report, at p. 54.

(2) Moore's Special Report, at pp. 102, 103.

(3) (1873) L. R. 4 A. & E. 217.

ministers thereof, at all times of their ministrations, shall be retained, and be in use, as were in this Church of England by authority of Parliament in the second year of the reign of King Edward the Sixth.' The construction to be put upon the words 'ornaments of the church' and upon the words 'by the authority of Parliament in the second year of the reign of King Edward the Sixth,' as used in this Rubric, has been under the consideration of, and has been determined by, the Judicial Committee of Her Majesty's Privy Council in the cases of *Westerton* v. *Liddell* (1) and *Martin* v. *Mackonochie*. (2) Their Lordships, in *Westerton* v. *Liddell*, said: 'The term "ornaments" in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but is used in the larger sense of the word "ornamentum," which, according to the interpretation of Forcellini's dictionary, is used pro quocumque apparatu, seu instrumento.' All the several articles used in the performance of the services and rites of the Church are 'ornaments'; and further, 'that the word "ornaments" as used in the Rubric of 1662 is confined to those articles the use of which, in the services and ministrations of the Church, is prescribed by the Prayer Book of Edward the Sixth.' (3) Their Lordships in that case came to the conclusion that ornaments of the church, not prescribed by the first Prayer Book of Edward the Sixth, and which are not consistent with and subsidiary to the performance of the services of our Church, are prohibited by law. In these conclusions the Judicial Committee expressed its concurrence in *Martin* v. *Mackonochie*." (4)

The Court is of opinion that these two crucifixes are in law church ornaments and not architectural decorations: see Ecclesiastical Law by Phillimore, p. 729; Lyndwood's Provinciale, 252, 253; and not being in use as such in the second year of Edward VI. are prohibited from being introduced into a parish church now by the Ornament Rubric. But Mr. Jelf in his able argument pressed upon the attention of the Court certain observations made by the Judicial Committee in their

(1) Moore's Special Report.
(2) (1868) L. R. 2 P. C. 365.
(3) Moore's Special Report, at p. 156.
(4) L. R. 2 P. C. 365, at p. 390.

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judgment in *Phillpotts* v. *Boyd* (the Exeter Reredos case) (1), in which their Lordships, after referring to the First Injunctions of Edward VI., to the mandate of Archbishop Cranmer to the Bishop of London dated February 24, 1547–1548, to remove all images remaining in any church, speak of this mandate as amounting to no more than an administrative act taken for the time, and, after referring to 3 & 4 Edw. 6, c. 10, intituled an "Act for the abolishing and putting away of divers Books and Images," proceed: "Their Lordships concur in the opinion expressed by this tribunal in *Westerton* v. *Liddell* (2), and cited by the learned judge in the Court below, viz., that the Act 'related to the destruction of images already ordered to be removed, but which either had not been removed or, having been so, were still retained for private veneration and worship.' It may be regarded as a recognition by the Legislature of the validity of these orders (though not expressly referred to), and of the obligation of obedience to them, but it does not go further; and, as with the mandate above referred to, so with this statute, it appears to their Lordships that the efficacy of the Act of Edward was spent upon the definite purpose to which it was directed, and that the Legislature did not thereby make, or intend to make, provision in respect of the subsequent use or abuse of any other images."

The effect of Mr. Jelf's contention would be, as it appears to the Court, that, after the orders contained in the injunctions and proclamations for removal from the churches of the crucifixes and other images tainted with superstition, it would be competent to the Ecclesiastical Courts in and after the time of Queen Elizabeth by faculties to place in the churches crucifixes and images of the same description as those which had been previously removed from the churches and destroyed on account of their being tainted with superstition, unless precluded by the Ornaments Rubric. It appears to the Court that, as the Judicial Committee was in that case dealing with the question of the legality of a sculptured representation of our Saviour's Ascension—an architectural decoration of a nature which never

(1) L. R. 6 P. C. 435, at pp. 461-462.
(2) Moore's Special Report, at p. 171.

had been tainted with superstitious uses—the concluding words of their observations, "that the Legislature thereby did not make, or intend to make, provision in respect of the subsequent use or abuse of any other images," must be limited to images of such a description as had not been specifically condemned by it and removed from churches as tainted with superstition. And this construction is in accordance with a subsequent passage of their Lordships' judgment on the words "false and feigned images" contained in a proclamation issued by Queen Elizabeth, that "whatever meaning be assigned to these words, the language of both the Injunctions and the Proclamation is plainly addressed, not to all 'pictures, paintings, or monuments, &c.,' but to a limited class of them, and this a class tainted with falsehood or superstition." (1) It is also in accordance with the following passages in the judgment of the Judicial Committee in the St. Paul's, Knightsbridge, case (*Westerton* v. *Liddell* (2)): "Although it is true that crosses had been abused as well as crucifixes and images of saints, it must be remembered that there is a wide difference between the cross and the images of saints, and even, though in a less degree, between a cross and a crucifix. A cross was used as a symbol of Christianity for two or three centuries before either crucifixes or images were introduced; it was used for ages before the Reformation, and has continued ever since to be used as an ensign of honour, as an ornament both of buildings and persons, ecclesiastical and civil, public and private, without any relation to superstitious or even to religious usages." (3) Again: "Upon the whole, their Lordships, after the most anxious consideration, have come to the conclusion that crosses, as distinguished from crucifixes, have been in use, as ornaments of churches, from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of churches." (4) It was also observed by their Lordships in

(1) L. R. 6 P. C. at p. 464.
(2) Moore's Special Report, 162.
(3) Moore's Special Report, at pp. 162, 163.
(4) Moore's Special Report, at p. 175.

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Phillpotts v. *Boyd* (1) that 3 & 4 Edw. 6, c. 10, was repealed by 1 Mary, stat. 2, c. 2. But that statute was repealed by 1 Jac. c. 25, s. 48, thereby reviving the statute of Edward VI. And that though the Act of James was repealed by 26 & 27 Vict. c. 125, the Act of Edward remains unrepealed by virtue of a section in that same Act of Victoria which provides that it did not repeal any Act revived by a former Act. But if the Act of Edward VI. is for all purposes a spent Act, where was the use of reviving it and keeping it in force up to the present day?

The finding of the Court on the question of the crucifixes is as follows:—

First, that they are in ecclesiastical law ornaments and not architectural decorations, and, not being in use at the church in the second year of Edward VI. as church ornaments, their introduction into a parish church is prohibited by the Ornament Rubric.

Secondly, that if they are deemed to be architectural decorations, whether carved in stone, wood, or other material, having regard to the fact that all crucifixes were by statutory Injunctions and Proclamations issued at the time of the Reformation, and by 3 & 4 Edw. 6, c. 10, ordered to be removed from all churches as being tainted with superstition, and are liable to be used for superstitious purposes, it is not competent to an Ecclesiastical Court to grant a faculty for the introduction into a church of an isolated crucifix as an architectural decoration which may lawfully be introduced into a church.

Thirdly, that if they are per se lawful as church ornaments or as architectural decorations, it would be an unwise exercise of the discretion of the Court to authorize their retention in this church for the following reasons:—

First, that they were introduced into the church to be used for superstitious purposes, and were so used by the minister of the church and members of the congregation for nearly twenty years.

Secondly, that, although since the end of January, 1898,

(1) L. R. 6 P. C. 435, at p. 461.

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when Dr. Cobb became curate in charge of the parish, there is no evidence of their having been used superstitiously, there is no guarantee that they may not be so used by his successors, temporary or permanent, or members of the congregation.

Thirdly, that their introduction and retention in the church has been the cause of offence to three past churchwardens of the parish, who protested to Mr. Phillips against their retention, as well as to other parishioners, many of whom in consequence of the illegal ornaments and Ritualistic practices in the church ceased to attend it.

Fourthly, that, although the vestry had passed a resolution instructing the churchwardens to oppose the petitioners' suit, many who supported the resolution were induced to do so according to the evidence of Mr. Farris, the senior churchwarden, not for the purpose of expressing an opinion favourable to the retention of the crucifixes in the church, but as a protest against the petitioners taking a room in the parish for the purpose of involving it in the present litigation. That Mr. Farris himself thought that the services in Mr. Phillips's time were a great deal too advanced, and that he did not approve of everything he saw in their Ritualistic services, and had consequently abstained from going much to the church, and that, though the parishioners admired Mr. Phillips as a man, many of them who subscribed for a testimonial to him on his leaving the parish did not approve of the services. During Mr. Phillips's time it appears there were only about twelve parishioners who regularly attended the Sunday services, and since he left these have ceased to attend, and have been succeeded by about the same number who prefer Dr. Cobb's mode of conducting the service.

The next question for the consideration of the Court is whether—having regard to the fact that the sole object the petitioners had in view in taking a room in the parish was to qualify them to institute a suit in this Court in a civil form for the purpose of procuring the removal from the church of illegal ornaments—by taking this room they were entitled to be placed as ratepayers on the parish rate-books, and to vote as parishioners at the parish vestries. They are by the three

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statutes cited, passed in the reign of George III., by common law and by the cases parishioners of St. Ethelburga. As occupiers of the room they contributed indirectly to the rates of the parish, and to the parochial house tithes for the support of the rector; and no authority has been cited to shew that it is the duty of the Court to take into consideration the motives which induced them to qualify themselves as parishioners in order to deprive them of exercising the rights of parishioners when their sole object in doing so is to vindicate the supremacy of the law. The cases in the civil courts cited go the other way: *Etherington* v. *Wilson* (1); *Batten* v. *Gedye*. (2)

The legal property of church ornaments is vested in the churchwardens as a quasi corporation in trust for the parishioners. It was, therefore, competent for any one of the petitioners, as a non-parishioner, upon the churchwardens refusing to take measures for the removal from the church of the crucifixes as illegal ornaments, with the leave of the Court to promote the office of the judge against them, and to proceed by articles for the purpose of obtaining an order from the Court to enforce their removal.

They elected, however, for convenience and other reasons, to qualify themselves as parishioners to enable them to obtain this object in any civil suit, and in my opinion, on the grounds I have stated, their qualification is sufficient to entitle them to do so.

There were two other minor questions raised by the petitioners in the case. They asked the Court to order by faculty the Ten Commandments, which had been removed from the east wall of the church, to be replaced there. It appeared by the evidence that their removal was intended by the churchwardens to be a temporary and not a permanent one, and was made for the purpose of repairing the east wall and the tablets on which the Commandments were inscribed, and that owing to the pendency of this suit they had decided to defer their replacement until its termination; and they stated through their counsel that they were prepared to undertake to restore them to their former position as soon as they were redecorated.

(1) 1 Ch. D. 160. (2) 41 Ch. D. 507.

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The Court, therefore, considers it to be unnecessary to make an order for the replacement of the Ten Commandments, and will accept in lieu of one a written undertaking to be filed in the registry by the churchwardens to replace them within a time named.

The other question raised was in reference to a block of carved wood which had been placed in the centre of the reredos in substitution for a Tabernacle which stood there prior to Dr. Cobb becoming curate in charge for the reception of the Reserved Sacrament. This Tabernacle was clearly an illegal church ornament. It was removed by the builder, who was engaged in repairing the chancel under the directions of the churchwardens. They instructed him to replace it with a block of carved wood similar to the one the petitioners seek to have removed. The builder with a view to save expense placed a piece of wood inside the Tabernacle, and nailed it up instead of replacing it with a new block of wood. Dr. Cobb and the churchwardens objected to this, and ordered him to make the present pedestal, so as to leave no room for the suggestion that it might be used as a Tabernacle. As they acted in good faith in this matter and with an honest desire to comply with the law, it appears to the Court that there is no reason why the block of wood should be removed, and the Court is prepared to confirm its retention by faculty.

On the question of costs, the Court will follow the order made by Dr. Lushington in the *St. Paul's, Knightsbridge, Case* (1), in which the ornaments objected to had been introduced long before the churchwardens in that case had come into office, and had remained there without objection taken to them for a considerable period, and he therefore left each of the parties to pay their own costs. In the present case the crucifixes were introduced into this church many years before the present churchwardens came into office, and there is no evidence to shew that the rector, who was non-resident, was aware of their introduction. The Court, therefore, will leave each party to pay their own costs. But as to the Court fees, as each of the parties were applicants for a faculty, these should be divided

(1) Moore's Special Report, at pp. 83, 84.

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equally between them. The Court is, however, of opinion that the respondents' share of these costs should not be paid by the churchwardens, but wholly by the rector, as the crucifixes were introduced by Mr. Eldred as his curate in charge, for whose acts as his agent he was responsible.

The order of the Court will be: first, that it rejects the prayer of the respondents to grant a confirmatory faculty for the retention in the church of the two crucifixes, but sanctions the retention therein of the block of carved wood on the reredos as prayed by them; and, secondly, that on the prayer of the petitioners it will direct a faculty to issue to the churchwardens of the parish as officers of the Ordinary directing and authorizing them to remove from the church the two crucifixes, including an order as to costs to the above effect. (1)

Solicitors for petitioners: *Todd & Co.*

Solicitors for opponents: *Brooks, Jenkins & Co.*

(1) The opponents appealed, but the appeal was not proceeded with.

C. F. J.

[IN THE COURT OF APPEAL.]

C. A. 1900 *Jan.* 26.

THE SNARK.

Admiralty—Sunken Wreck in Navigable River—Contract to Raise—Liability of Owner for Negligence of Contractor.

A barge belonging to the defendants, without negligence on their part, was sunk in the fairway of the river Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her and, for that purpose, put him in possession and control; but, owing to the guard-vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage:—

Held, by the Court of Appeal (A. L. Smith, Rigby, and Collins L.JJ.), affirming the decision of Gorell Barnes J., [1899] P. 74, that the defendants were personally responsible, as (following *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72), they were bound to see that the necessary precautions were taken to prevent danger to the public, and could not escape from this liability by throwing the blame on the contractor employed by them to do the work. Secondly, because, following *The Utopia*, [1893] A. C. 492, they were under an obligation to protect other vessels from receiving injury from the sunken barge, as the employment of the contractor did not amount to an abandonment or transfer of the possession, management, and control of the wreck.

APPEAL by defendants from a judgment of Gorell Barnes J. (1)

The question was whether the defendants were liable, in an action in personam as principals, for damage sustained by the plaintiff's steamship through the negligence of a contractor employed by the defendants to raise their sunken barge.

The facts are set out at length in the report in the Court below, and may be briefly summarised as follows:—

On August 1, 1897, the barge *Snark*, owned by the defendants, in consequence of a collision with a steamer and without negligence on the part of the defendants or their servants, was sunk in the fairway off Cuckold's Point in Limehouse Reach of the river Thames.

(1) [1899] P. 74.

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The defendants employed a competent person, one Forrest, an under-waterman and diving contractor, to raise the barge for 25*l.*, and the defendants undertook to provide a barge for Forrest to work with. Nothing was said about lighting the wreck.

Forrest told the officials of the Thames Conservancy of the sinking of the barge, and for a short time a boat belonging to the Conservancy, with a flag on it, was made fast to the *Snark*. For this service the defendants paid the Conservancy, and on the defendants supplying Forrest with the barge *Rhoda*, he and his men went down to the place where the *Snark* was sunk, and took charge of her. The Conservancy boat was then taken away and the *Rhoda* made fast.

In the early morning of August 3 the German steamship *Vesta*, owned by the plaintiff, and coming up the river in charge of a pilot, while passing at a safe and proper distance from the warning lights on the *Rhoda*, ran into the sunken barge, and was seriously damaged, owing to the *Rhoda* having been negligently allowed to swing out of position.

At the trial on December 5 and 6, 1898, these facts were proved, and the question of law as to the liability of the defendants reserved. On the argument on December 13, it was contended on behalf of the plaintiff that he was entitled to judgment against the defendants personally, for, after the sinking of the barge, not having either abandoned or legitimately transferred the control, her owners, the defendants, remained under an obligation to warn other vessels of the danger, and could not divest themselves of this obligation by the employment of Forrest.

On behalf of the defendants it was contended that the injury sustained by the plaintiff was due to negligence in the way the work was done, not to any danger in the doing of it, and therefore, as the defendants had employed an independent contractor to whom they had transferred the possession and control, they were not liable.

On January 26, 1899, Gorell Barnes J. delivered a considered judgment, holding that the defendants were liable on the ground that the wreck was a dangerous nuisance, and that the

principles laid down in *The Utopia* (1) and *Hardaker* v. *Idle District Council* (2) applied, for the employment by the defendants of another person to raise and remove their property was not a transfer of the barge which would discharge them from the duty towards the public of using reasonable care to warn other vessels of the position of the wreck.

The defendants appealed.

1900. Jan. 26. *Laing, Q.C.*, and *Lauriston Batten*, for the appellants (defendants). The learned judge in the Court below held, on the authority of *Hardaker* v. *Idle District Council* (2), that the defendants had a duty to discharge which they could not get rid of; but that decision, as well as the more recent case of *Holliday* v. *National Telephone Co.* (3), depend on the finding of fact that the work to be performed was necessarily attended with risk. Here, however, the work in itself — apart from collateral acts of negligence for which a principal is not liable —was not dangerous, and the defendants having employed an admittedly competent independent contractor cannot be held responsible for the negligence of his servants, as he was a person exercising a separate employment: *Milligan* v. *Wedge*. (4) Secondly, there is a clear distinction between the duties towards the public of owners of property on a highway on land and of owners of property sunk in a river: see *Rex* v. *Watts*. (5)

In the case of a sunken wreck liability ceases on abandonment of the possession and control. In *Brown* v. *Mallett* (6) the obligation to protect other vessels from injury was held not to lie on the defendants in the absence of an allegation that the possession and control of the vessel, after she had foundered, was in them. So in *White* v. *Crisp* (7) it was laid down that where the owners have properly parted with the control and management of the vessel their liability ceases.

In *The Utopia* (1) it was expressly held that the management

(1) [1893] A. C. 492.
(2) [1896] 1 Q. B. 335.
(3) [1899] 2 Q. B. 392.
(4) (1840) 12 Ad. & E. 737.
(5) (1798) 2 Esp. 675; 5 R. R. 766.
(6) (1848) 5 C. B. 599.
(7) (1854) 10 Ex. 312.

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and control of the sunken vessel, not being at the material time in the hands of the servants of the defendant owners, they were not liable, even though they intended to raise the vessel and eventually did so, and even though it was doubtful whether the port authority had power to deal with the protection of sunken vessels.

The defendants were not bound to raise the barge. They could have left the work of lighting and removing her to be performed by the Thames Conservancy, under their statutory powers, and for the negligence of that body the defendants would not have been liable: see *The Douglas* (1), where the owners of the wreck, though liable as wrongdoers for the sinking of their vessel, were held not to be responsible for the neglect of the harbour-master to light the wreck, whereby another vessel sustained damage.

If the barge had been raised, and, after she was afloat, had been run into owing to the negligence of Forrest to properly light her, Forrest would have been liable, not the defendants, for he, not the owners, would have been in control: see *The Quickstep*. (2)

[Reference was also made to *The Crystal* (3), and to Beven on Negligence, 2nd ed. p. 493.]

Carver, Q.C., and *Stubbs*, for the respondent (plaintiff), were not called upon.

A. L. SMITH L.J. This is an action brought by the plaintiff, who is the owner of the steamship *Vesta*, to recover damages against the owners of a barge called the *Snark*, which was sunk in the river Thames on August 1, 1897. What happened was this: The owners of the *Snark* wanted to get their barge up again, and never intended to abandon possession or control of it in any way, and they got into communication with a man named Forrest, who is described as an underwaterman—that is, a man who goes down under water to get up sunken vessels—and they entered into a contract with him to get up this barge.

(1) (1882) 7 P. D. 151. (2) (1890) 15 P. D. 196.
(3) [1894] A. C. 508.

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The evidence, as stated by Gorell Barnes J., is this: The officials of the Thames Conservancy were told by Forrest of the sunken barge, and for a short time before Forrest brought the *Rhoda* (that is, a barge lent by the owners of the *Snark*), a boat belonging to the Thames Conservancy, with a flag on it, was made fast to the *Snark*. For this service the defendants paid the Thames Conservancy, and this is all done long before the accident happened. Forrest brought the *Rhoda* and took charge of the sunken barge, and Forrest and his men alone remained. Forrest was paid for the work which he was executing for the defendants the sum of 25*l*. The learned judge in the Court below found that Forrest was guilty of negligence in this, that he did not light the sunken barge in a proper manner. The barge on which the lights were affixed drifted away from where it ought to have been, and they did not notify to the steamers coming up or going down the Thames where the sunken barge in fact was, with the result that those in charge of the plaintiff's steamer, the *Vesta*, coming up the Thames, ran into the sunken barge and sustained damage. Thereupon an action was brought in the Admiralty Court, and the first question which had to be decided by the learned judge of that Court was whether or not this sunken barge had been properly lighted by Forrest. The judge found that it had not, and he found that, by reason of its not being properly lighted, the plaintiff's steamship sustained the damage complained of.

The next question then arose, namely, were the defendants liable for this? It has been argued, on behalf of the defendants, that they are not liable. One ground taken before the learned judge in the Admiralty Court and before us was that the defendants were not liable because they delegated the work to Forrest, who comes within the term, well known in this Court, of "independent contractor," and therefore they were not liable for the negligence of Forrest. The Thames is undoubtedly a highway. This man was put to work, and was engaged by the defendants in doing work which was likely to cause injury to persons lawfully passing and re-passing along that highway, unless precautions were taken. It is

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said by the defendants, although that is so, still he was not the servant of the defendants for he was an "independent contractor."

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Now, we have had of late years a great deal to do with this question of independent contractor. In the case of *Hardaker* v. *Idle District Council* (1) Sir Nathaniel Lindley, the present Master of the Rolls, my brother Rigby, and I considered this question of the liability of a defendant for the acts of an independent contractor, and we stated what in our judgment was the law relating thereto. That case has been referred to by Gorell Barnes J. in this case, and I am not going to refer to it any more except to say that I see nothing to repent of in what any one of us said in that case. There have been other cases since then which I may pass by, because my brother Bruce in his judgment in *Penny* v. *Wimbledon Urban Council* (2) has dealt with them. *Penny's Case* (2) came before this Court on appeal (3), and I then said, and I say it again, that I agree with the manner in which my brother Bruce stated the law applicable to this question of independent contractor, when a defendant is sued for a tort. I will read the passage from the judgment of Bruce J., because I cannot put the matter more tersely or more clearly. It is: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith* (4) is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do."

I subscribe to every word of this passage as being the law, and, in my judgment, the present case falls within the decision

(1) [1896] 1 Q. B. 335.
(2) [1898] 2 Q. B. 212.
(3) [1899] 2 Q. B. 72.
(4) (1861) 10 C. B. (N.S.) 470.

of *Penny* v. *Wimbledon Urban Council* (1) and the reasons of that decision. Therefore, this point does not avail the present defendants.

It is, however, said that, although this law may apply to matters arising on land, it does not apply to matters arising on water, or matters arising, as in this case, with regard to a sunken barge in the river Thames. I think the learned counsel for the appellants have made out that in the case of a barge navigating, as here, the river Thames, which goes to the bottom, it is in the power of the barge-owner, if he is so minded, to abandon the barge or transfer it, and have nothing more to do with it. The necessary result would be that the public authority—that is, the Thames Conservancy—acting under the powers conferred by their private Act, would have to remove the barge so as to prevent its being an obstruction to the navigation of the river Thames.

On this part of the case the judgment of the Privy Council, delivered by Sir Francis Jeune in *The Utopia* (2), and referred to by Gorell Barnes J. in his judgment, seems applicable. It is there in effect laid down that although it is in the power of the owner to abandon his sunken barge, and have nothing more to do with it, until he has done that he is under the ordinary liability of every other man. Sir Francis Jeune in delivering the judgment of the Privy Council in 1893 summarises the result of the earlier cases, and says: "The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owner an obligation in regard to the protection of other vessels from receiving injury from her."

Now where is there any evidence, or what is more, proof, that the owners of this barge abandoned or properly transferred possession, management, and control of the wreck within

(1) [1898] 2 Q. B. 212. (2) [1893] A. C. 492.

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the meaning of that judgment? They clearly did not. What they did was to employ Forrest to get this barge up, not for the purpose of abandoning control of her, but for the opposite purpose of getting her above water again.

This case seems to me to fall within the decision of the Privy Council, and for these reasons I am of opinion that the excellent judgment of my brother Barnes should be affirmed.

RIGBY and COLLINS L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants (defendants): *J. A. & H. E. Farnfield.*

Solicitors for respondent (plaintiff): *Stokes & Stokes.*

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Feb. 6.

[DIVISIONAL COURT.]

THE RODNEY.

Admiralty—Damage to Cargo—Bill of Lading incorporating the Harter Act (Act of Congress of U.S.A., February 13, 1893)*—Negligence in "Management" of the Vessel.*

Cargo was shipped at a port in the United States under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

During the voyage the vessel met with heavy weather, and, the forecastle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold, and damaging a portion of the cargo. The owner of the cargo sought to render the shipowner liable:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), reversing the decision of a county court judge, that the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, the act having been done for the purpose of rendering the forecastle habitable, that is, with the object of rendering the ship proper for the purpose for which she was intended.

The Glenochil, [1896] P. 10, followed.

APPEAL by plaintiffs, the American Export Coal Company of New York, in an action for balance of freight, against a

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decision of the judge of the county court of Newcastle-on-Tyne in favour of the counter-claim for damage to cargo set up by the defendant Thomas Richardson, corn-factor, of Newcastle-on-Tyne.

The question turned on the meaning of the word "management" in s. 3 of the Act of Congress of the United States, approved on February 13, 1893, and commonly known as "the Harter Act." (1)

The material facts were shortly as follows:—

On January 17, 1899, the plaintiffs' steamship *Rodney* left Baltimore for Newcastle with a cargo of wheat and maize, shipped under two bills of lading incorporating the Harter Act and indorsed to the defendant, the consignee of the cargo. The vessel encountered exceptionally heavy weather, and, on arrival at Newcastle, the cargo was found to be damaged to the extent of 40*l.* 18*s.* 9*d.*, which sum the defendant retained out of the freight due to the shipowners, and for which sum he counter-claimed on the shipowners, as plaintiffs, suing the defendant to recover this amount as balance of freight.

At the trial the plaintiffs admitted liability for 14*l.* 17*s.* 2*d.* in respect of coal damage and improper stowage, and the learned judge found in their favour in respect of 7*l.* 19*s.* 6*d.* damage by sea water through straining, but in respect of the balance of 18*l.* 2*s.* 1*d.* for damage by sea water in the fore-hold, the learned judge in giving judgment, on December 12, 1899, said that the damage was due "to the breakage of a pipe running under the deck, and immediately above the cargo space, to which pipe no access could be gained when the vessel was loaded. Evidence was given to prove that the pipe in question was one inserted in the vessel at the instance of the port sanitary authority at Blyth in June, 1898,

(1) Sect. 3: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel."

The Act is set out in full in *Dobell* v. *Steamship Rossmore Co.*, [1895] 2 Q. B. 408, at pp. 409, 410, 411.

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for the purpose of carrying off the drainage of the forecastle where stagnant water seems to have lain, and, in order to prevent smell arising from the bilges, a syphon trap under the order of the same authority had been constructed immediately under the sink on the deck, while the sink itself, to prevent the passage of solid matter into it, was protected by a grating. The pipe was a two-inch lead pipe and was not apparently intended to carry off anything beyond the forecastle drainage, but towards the end of the bad weather encountered on the voyage, during which some heavy seas had flooded the forecastle, the boatswain, whose berth was in the forecastle, thinking to accelerate the clearance of the water, first took off the grating, and then, as the water did not pass off fast enough, endeavoured to clear the pipe by means of a poker and hammer, with the result that he drove a hole through the bottom of the syphon trap, and allowed all the water then and thereafter about the forecastle a clear course into the cargo below."

The learned county court judge found in favour of this item of the counter-claim of the defendants on the ground that the cases (*The Glenochil* (1) and *The Silvia* (2)) shewed that the words "in the management of the vessel" in s. 3 of the Harter Act "must be confined to the performance (though improper), or non-performance, of such acts as are, or ought to be done, for the safety of the vessel, and for her maintenance in a seaworthy condition."

The plaintiffs appealed.

Kilburn, for the appellants (plaintiffs). In the Court below the act of the boatswain was held not to have been done in the "management" of the vessel, and, therefore, that the shipowners were responsible; but it is submitted that the learned county court judge has narrowed the meaning of the word "management" in s. 3 of the Harter Act, and that this case is covered by *The Glenochil*. (1) There the President (Sir

(1) [1896] P. 10.

(2) (1895) 68 Fed. Rep. 230; (1898) 171 U.S. 462. The facts and the decision by the United States Circuit Court of Appeals are set out at p. 411 of *Dobell* v. *Steamship Rossmore Co.*, [1895] 2 Q. B. 408.

F. H. Jeune) says (1) that the negligence consisted in the "mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship," and that "there was a mismanagement of a pipe, and the result was that water was let in and damaged the cargo." In the same judgment the case of *Dobell* v. *Steamship Rossmore Co.* (2) is dealt with, and the dictum of Kay L.J. confining the word "management" to "managing the sailing of the vessel" is explained, and it is shewn that the word goes beyond "navigation," and takes in a class of acts such as that in the present case "which do not affect the sailing or movement of the vessel, but do affect the vessel herself." The decision in *The Ferro* (3) is also there referred to as illustrating the class of acts which involve "want of care of vessel indirectly affecting the cargo."

[He was stopped by the Court.]

Scrutton, for the respondent (defendant). The words of the Harter Act when brought in by reference in a bill of lading are to be construed not as in an Act, but as words occurring in the bill of lading: *Dobell* v. *Steamship Rossmore Co.* (4); and in construing a clause in a bill of lading exempting a shipowner from liability, if the clause is ambiguous and of doubtful meaning, the construction most in favour of the shipper is to be applied: *Norman* v. *Binnington.* (5) The word "management," as used in s. 3 of the Act of Congress, must be read in conjunction with ss. 1 and 2 of the same Act; but, even so read, it is ambiguous, as is shewn by the various meanings attached to it in the cases referred to by counsel for the appellants, in all which cases the meanings agree in going very little beyond that of "navigation," and all relate to the safety of the vessel.

It is submitted, therefore, that the meaning of the word will not be extended in favour of the shipowner so as to cover an act such as that of the boatswain in the present case, for, as pointed out by the learned county court judge, "If there had been evidence to shew that the vessel was at the time in

(1) [1896] P. 10, at p. 14.
(2) [1895] 2 Q. B. 408.
(3) [1893] P. 38.
(4) [1895] 2 Q. B. 408, at p. 413.
(5) (1890) 25 Q. B. D. 475, at p. 477.

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danger from the water in the forecastle, and that the boatswain was acting in obedience to, and in the endeavour to carry out, the orders of a responsible officer, or if the evidence given justified the inference that the boatswain, in a time of danger, had acted on his own initiative for the safety of the vessel, the case would wear a different aspect"; but "the man was endeavouring for his own comfort and convenience to clear the forecastle of water."

[The cases of *Good* v. *London Steamship Owners' Association* (1) and *Carmichael* v. *Liverpool Sailing Ship, &c., Association* (2), were referred to.]

THE PRESIDENT (SIR F. H. JEUNE). The principles laid down in *The Glenochil* (3) appear to me to apply to this case. It goes a little beyond, because, undoubtedly, in *The Glenochil* (3) the act done was one which it was necessary to do for the direct purpose of the management of the ship. It consisted in that case in water being run into the ballast tank, for the purpose of stiffening the ship, and in so doing the engineer let water into the cargo. That was, as we thought in *The Glenochil* (3), an act which was part, at any rate, of the management of the ship.

This case is a little different, but to my mind it is very little different. The ship experienced bad weather, and the forecastle became flooded, and thereupon the boatswain, in order to clear the forecastle of water—especially, no doubt, because that formed his own quarters—endeavoured to clear a pipe which, if it had been clear, would have carried off the water; but he did the work negligently, and made a hole in the pipe instead of clearing it of the obstacle.

Is that an act done in the management of the ship? I think it is. The object was to clear the forecastle of water—that is to say, to render the forecastle habitable for the crew—for the purpose of rendering the ship proper for the purpose for which it was intended. It appears to me to fall within the view taken in the case of *The Glenochil*. (3) To put the matter

(1) (1871) L. R. 6 C. P. 563. (2) (1887) 19 Q. B. D. 242.
(3) [1896] P. 10.

in a very small compass, I think the Court below has somewhat unduly limited the meaning of the word "management." The learned judge says: "The cases, I think, shew that the words must be confined to the performance (though improper) or non-performance of such acts as are or ought to be done for the safety of the vessel and for her maintenance in a seaworthy condition." I think that is too narrow a view. The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil*. (1)

GORELL BARNES J. It seems to me, as the President has pointed out, that the Court below has unnecessarily confined the meaning of the words "management of the ship." Practically there is very little difference, if any, between the case of *The Glenochil* (1) and this case, except that in the former case there are to be found some expressions referring to the act as being done for the safety of the ship, but those expressions were not intended to limit the meaning of the words "management of the ship." I think that the words "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the cargo.

Appeal allowed.

Solicitors for appellants (plaintiffs): *Holman, Birdwood & Co.*

Solicitors for respondent (defendant): *King, Wigg & Co., for H. J. Richardson, Newcastle-on-Tyne.*

(1) [1896] P. 10.

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1899
Dec. 11, 15.
1900
Feb. 7.

COWLEY *v.* COWLEY.

Dignity or Title of Honour—Marriage with a Peer of the Realm—Dissolution of Marriage—Former Wife marrying a Commoner—Continued Use of Title derived from former Husband—Injunction to restrain.

Where the marriage of a woman with a peer is dissolved, and she afterwards marries a commoner, she loses any dignity or title of honour acquired by the first marriage; and the continued use of any such title will be restrained by injunction at the suit of the first husband.

Quære whether the dissolution of marriage would alone determine the right to use the title.

Motion by a peer of the realm, formerly respondent in a suit for dissolution of marriage, for an injunction to restrain his former wife, now the wife of a commoner, from continuing to use the style and title which she acquired on her first marriage.

Bargrave Deane, Q.C., and *Willock*, for Earl Cowley, the applicant.

Lawson Walton, Q.C., and *Barnard*, for the lady.

Cur. adv. vult.

Gorell Barnes J. In this case Lord Cowley seeks to restrain a lady who was formerly his wife, but is now the wife of Mr. Robert E. Myddleton Biddulph, from using the style or title "Countess Cowley." The application is made to this branch of the Court in a suit for divorce, brought by the lady against Lord Cowley and determined in her favour.

It will be convenient in this judgment still to term the parties petitioner and respondent respectively.

The respondent is Henry Arthur Mornington Wellesley, third Earl Cowley. The first Lord Cowley was raised to the peerage of the United Kingdom in 1828 with the title Baron Cowley. His son, the present Earl's grandfather, was, by letters patent under the Great Seal dated April 11, 1857, created Viscount Dangan in the County of Meath and Earl Cowley. On the

death of his father in 1895 the respondent succeeded to these titles, which were, by the letters patent aforesaid, limited to the first Earl and the heirs male of his body lawfully begotten and to be begotten.

On December 17, 1889, the respondent married the petitioner, who is a daughter of the Marquis of Abergavenny; there is one child of the marriage—a boy, Christian Arthur Wellesley, who is now by courtesy called by his father's inferior title, Viscount Dangan.

The petitioner, on June 17, 1896, instituted a suit in this Court for a divorce from the respondent, and on February 2, 1897, obtained a decree nisi for the dissolution of her marriage with him on the ground of his desertion and adultery. This decree was made absolute on August 9, 1897. The petitioner afterwards married her present husband, Mr. Biddulph. Notwithstanding that her marriage with the respondent has been dissolved and that she has married again, the petitioner, without any sanction from the Crown, has continued to use and still uses the style or title, "Countess Cowley"; for example, in her affidavit in opposition to this motion, she describes herself as "Violet, Countess Cowley," and signs herself "Violet Cowley." No objection seems to have been made by the respondent to this use of the title by the petitioner between the date of the final decree and the lady's second marriage; but since she has become the wife of Mr. Biddulph the respondent has made formal objection to the petitioner using the title "Countess Cowley." On December 14, 1898, the respondent's solicitors wrote on his behalf to the solicitors for the petitioner a letter in the following terms:—

"We presume that you still act for the Lady Violet Biddulph, formerly Countess Cowley. We have been consulted by the Earl Cowley in reference to the fact that, although married to Mr. Biddulph, the lady continues to use the title 'Countess Cowley,' notwithstanding it was she who sought the divorce, and by her own volition obtained a dissolution of the marriage. As long as Lady Violet was unmarried there may have been some ground for her continuing to bear her late husband's name, although we believe that this is a moot legal point;

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now, however, that she has remarried, there cannot be the slightest doubt about the matter. While very anxious to avoid any unnecessary annoyance, we are instructed by Lord Cowley to request that the Lady Violet will cease using his name, and adopt the only and very honourable one to which she is now entitled, viz., Lady Violet Biddulph.

"Trusting that we may hear from you that this course will be adopted.

"We are, your obedient servants,

"Wontner & Sons.

"Messrs. Lewis & Lewis."

A letter in reply was received from the petitioner's solicitors as follows:—

"Gentlemen,—We are in receipt of yours of the 14th. In reply to your inquiry, we have to inform you that Countess Cowley intends to retain the same name as her son, notwithstanding that she has been compelled to divorce her husband on the grounds of his desertion and adultery.

"Yours obediently,

"Lewis & Lewis.

"Messieurs Wontner & Sons."

On July 6, 1899, the respondent's solicitors wrote a letter to the petitioner's solicitors, in which the following passage occurs:—

"Thirdly, we are again instructed to ask that Lady Violet Biddulph ceases to call herself by the name and title of 'Countess Cowley.' We have made research into the matter, and find that she undoubtedly has no right to so call herself, the only person entitled to now bear the title being Lord Cowley's mother (who since the divorce has become the only 'Countess Cowley') and she has also instructed us on her behalf, and requested us to ask that the Lady Violet should cease to bear this name and title.

"We are writing you this in order if possible that some arrangement shall be arrived at on these three points, all of which we desire to settle amicably; but unless we can come to

some settlement within the next week we shall have to apply to the Court upon all three subjects without further delay.

"Yours obediently,

"Wontner & Sons.

"Lewis & Lewis."

To this letter the petitioner's solicitors replied on July 7, so far as is material, as follows:—

"It is useless your writing again to ask that Lady Cowley shall call herself by any name other than the Countess Cowley; all that we have to say upon that subject we have already said.

"We observe that you say you will go to the Court upon all these three subjects; we are prepared at any time to receive notice of motion on behalf of Lady Cowley.

"Yours obediently,

"Lewis & Lewis.

"Messrs. Wontner & Sons."

The two other matters alluded to in these letters do not bear upon the present question.

The respondent then moved the Court in the old suit between the parties to restrain the petitioner from using the style or title aforesaid on the ground that by so doing she was guilty of molestation. The motion was supported by the respondent's mother, the Dowager Countess Cowley.

Upon the motion coming on before the Court it seemed to me that the real questions raised between the parties were not strictly questions of molestation, but these, namely, whether the petitioner is entitled to use the style or title in question; and, if not, whether the respondent has any right to obtain an injunction in the High Court to restrain the petitioner from so doing, and that these questions could not be dealt with in a divorce suit which was at an end, except so far as the Court still has jurisdiction to entertain applications with regard to the custody, maintenance, and education of the child of the marriage during his minority. It was thereupon agreed by counsel for the parties that the motion should be treated as if it were a motion to restrain the petitioner from using the style

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or title "Countess Cowley" in a suit for that purpose brought in the High Court, and the arguments proceeded on that basis.

The first question then is, whether the petitioner is entitled to use the style or title "Countess Cowley." The petitioner, although the daughter of the Marquis of Abergavenny, was in the legal sense a commoner. At the time of her marriage with the respondent he had not succeeded to the peerage; but when his father died in 1895 he became Earl Cowley and a peer; the petitioner, by virtue of her union with the respondent, became a peeress, for husband and wife are regarded in certain respects as one person in law, and a woman who is married to a peer of the realm becomes entitled to the same dignity as her husband, and acquires all the rights and privileges of peerage which are consistent with her sex: for instance, if she is accused of treason or felony, she can only be tried by the House of Peers. The statute 20 Hen. 6, c. 9, declared what would seem to have been the common law—that ladies of great estate in respect of their husbands, peers of the land, married, or sole, that is to say, duchesses, countesses, or baronesses, shall be put to answer, and judged before such judges and peers of the realm, as peers of the realm should be, if they were indicted or impeached of treasons or felonies done, or thereafter to be done, and in like manner and form, and none otherwise.

The petitioner then, on the respondent becoming a peer, shared his dignity, and as his wife her style and title was Countess Cowley, Countess being the Norman feminine which corresponds with Earl or *Comes*. See the explanation of this title: Selden's Titles of Honor (ed. 1672), Part II. chap. v. sec. 7, at pp. 526 et seq.

Her marriage with him has, however, been dissolved, and she has married again to a commoner, and she has lost her dignity aforesaid, and all the rights and privileges annexed to it. What her legal name, position or dignity was between the time of the dissolution of her first marriage and her second marriage was not discussed before me, and it is not necessary to consider this, for there can be no doubt that, being legally a commoner by birth, and only a peeress by marriage with Lord

Cowley, on her second marriage she took her present husband's position, and her proper legal description became Violet, the wife of Robert E. Myddleton Biddulph, and, as the daughter of a Marquis, she would be called by courtesy Lady Violet Biddulph.

The law on the subject is shortly stated in Cruise on Dignities (Treatise on the origin and nature of Dignities and Titles of Honour, 2nd ed. (1823), chap. 3, s. 83, at p. 90) as follows:—

"If a woman, who has acquired a dignity by marriage, afterwards marries a commoner, she loses her dignity, and all the rights and privileges annexed to it. For that which is gained by marriage, may be lost by marriage. Eodem modo quod quid constituitur, dissolvitur."

This is in accordance with all the old authorities: see *Acton's Case* (1); *Countess of Rutland's Case* (2); Brooke's Abridgment, Tit. Nosme de dignitie, fol. 94, sec. 69; Co. Litt., Tit. 'Of Fee Simple,' fol. 16 b, ed. 1832; 2 Inst. vol. i. Tit. Magna Charta, cap. 29, 50 (3); *Duchess of Suffolk's Case* (4); Comyn's Dig., vol. iii., Tit. Dignity (C. 6), at p. 407; Fortescue de Laudibus, 95.

In the case of *Haward* v. *Duke of Suffolk* (5), decided in Hilary Term, 6 & 7 Edw. 6, a writ of partition was brought against the Duke of Suffolk and his wife, and others, by Ranulf Haward, Esquire, and Lady Ann Powys his wife; and so was she named in the writ: and exception was taken for a misnomer, because she ought only to have been called by the name of her husband, and not otherwise. And by the opinion of Montague C.J. and Hales J. the exception was good, the reason given being that "by the law of God" she was

(1) (1603) 4 Co. Rep. 118 b.

(2) (1606) 6 Co. Rep. 53 b.

(3) The passage to be found in the second part of the Institutes of the Laws of England, vol i., cap. 29, Tit. Magna Charta (at p. 50), is as follows: "If a woman that is noble by birth doth marry under the degree of nobility, yet she shall be tried by her peers; but if she be noble by marriage, and marry under the degree of nobility, she loseth her dignity, for as by marriage it was gained, so by marriage it is lost, and she shall not be tried by her peers."

(4) (1558) Ow. 81, 82.

(5) (1553) 1 Dyer, 79 b.

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"under the power of her husband, and so her name of dignity shall be changed according to the degree of her husband, notwithstanding the curtesy of the ladies of honour and of the Court." Upon which the plaintiff brought a new writ to answer to "Ranulf Haward and Ann his wife, late wife of the Lord Powys deceased."

Further, in *Lady Dacres' Case* (1), in 1661, where she had petitioned the House of Lords claiming her privilege of Parliament, the House, upon the report from the Committee of Privileges, declared (having received the opinion of all the judges then present in point of law) "that the Lady Dacres, by marrying Mr. Chute, a commoner, hath forfeited and lost her privilege of peerage in law." Also, in 1692, the House of Lords ordered and declared "that privilege of Parliament shall not be allowed to minor peers, noble-women, or widows of peers; saving the right of peerage": and "further declared that if the widow of any peer shall be married to a commoner, she shall not be allowed privilege of peerage; and that this Order be added to the Roll of Standing Orders." (2) I may also refer to the following passage in his work on the Order of Procedure by the late Sir Charles George Young, Garter principal King of Arms (1851), p. 75: "The widows of Peers, Baronets, Knights of the Orders, and Knights Bachelors, are entitled to enjoy the same style and rank which they derived from their Husbands so long as they remain unmarried, but on marrying again they have no other style or rank than that which the second husband may confer upon them, it being the established law, that what a woman gains by marriage she loses by marriage." In a foot-note, referring to the above passage, the author states as follows: "Some instances, however, occur, where the Crown has permitted the retention of the title and precedence, notwithstanding a second marriage, as in the case of Catherine, Duchess of Lenox, relict of Esme, Duke of Lenox, who died in 1624, remarried to James, Earl of Abercorn, when, as a mark of favour, King Charles I.,

(1) Journals of the House of Lords, 13 Car. 2. (July 4, 1661), vol. ii. p. 298.

(2) Journals of the House of Lords, 5 & 6 Wm. & M. (Feb. 21, 1692), vol. xv. p. 241.

in 1632, granted his royal letter, declaring that, notwithstanding her said second marriage, she should still retain both the title of *Duchess of Lenox* and all the rank and precedence due thereto."

So far the law is clear, and on the argument before me the petitioner's counsel did not seek to maintain that the petitioner was still entitled to her former dignity of peeress, nor to a legal right in the title in question; but he contended that she was justified in continuing to use her former title by some usage of society. No authority, precedent, or evidence was produced in support of this contention; and this is not surprising, for a case which could give rise to a question such as that under consideration cannot often have arisen.

The only foundation for the contention was the following passage in Stephen's Commentaries, 13th ed. 1899, vol. ii. p. 528: ". . . . by Courtesy (or the usage of Society), all Dowager Peeresses, though afterwards married to commoners, are ordinarily addressed by their former title."

This statement was not supported by the citation of any further authorities, and even if it be correct this courtesy or usage of society (a somewhat vague term) is of no legal force or validity, and cannot alter the legal positions and titles of dowager peeresses (not in their own right) who have afterwards married commoners. They no longer have any right to their former privileges, rank, and titles, and it is therefore difficult to understand why any one in such a position should, without the sanction of the Crown, allow herself to be addressed by a title not hers as of right even though there may be a usage of society to do so. It is important to notice, in connection with this subject, that in some cases, of which instances are given in the affidavit filed in this case of Sir Albert William Woods, K.C.B., K.C.M.G., Garter principal King of Arms, the Sovereign in the exercise of the Royal Prerogative has expressly sanctioned the retention by dowager peeresses (not in their own right) marrying below the rank of their former titles, rank, and precedency, and directed memorials thereof to be recorded in the register books of the College of Arms.

There is a further answer to the contention aforesaid: it is

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obvious that the courtesy or usage of society, if correctly stated with regard to dowager peeresses (not in their own right) who have afterwards married commoners, has no application to the present case, where the petitioner's first husband is alive and is objecting to the use by her of a style and title which she only acquired as his wife, she now being the wife of another person.

It was further argued that the petitioner is justified in calling herself Countess Cowley because a person is entitled to call himself or herself by any name, and cannot be restrained from doing so. In support of this contention certain cases were cited to shew that the Courts will not restrain the use of a family name.

The principal of these was the case of *Du Boulay* v. *Du Boulay* (1), where Lord Chelmsford, in delivering the judgment of the Privy Council, said (2): "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress."

The foundation of this is that, except in certain cases where the right to the exclusive use of a name in connection with a trade or business has been acquired, there is by English law no right of property in a person to the use of a particular name to the extent of enabling him to prevent the assumption of his name by another.

But the argument omitted to notice the difference between the use of a name and the use of a title. The law as to the

(1) (1869) L. R. 2 P. C. 430. (2) L. R. 2 P. C. at p. 441.

former is as stated above, but as to the latter the position is entirely different. Titles of honour, or, in the language of the law, dignities, are conferred by the exercise of the Royal Prerogative. Among them, the principal is that of the peerage. The dignities of the peerage "having been originally annexed to lands were considered as tenements or incorporeal hereditaments wherein a person might have a real estate. And although dignities are now become little more than personal honours and rights, yet they are still classed under the head of real property": Cruise, cap. 4, sec. 1; Co. Litt. 16 b.

The grant of the dignity in the present case was to the grantee and the heirs male of his body, and created an estate in tail male. Lord Cowley has the exclusive right to the use of his titles, but on his marriage his wife became, as his wife, a sharer in his dignity and Countess Cowley. Even if she had become his widow and Dowager Countess Cowley she would have lost all the privileges she had acquired by her marriage if she married again to a commoner. She is now no longer the respondent's wife, but the wife of Mr. Biddulph, and has lost the right to style herself "Countess Cowley"; and, although she does not desire to represent that she is now the respondent's wife, she is still using a style and title which can only lawfully be used by a woman who is the wife of the respondent, and is not merely assuming a name to the use of which objection could not be raised. I am therefore of opinion that the petitioner is not entitled to use the style and title "Countess Cowley."

The next and more difficult question is, whether the respondent is entitled to obtain an injunction to restrain the petitioner from using the style and title aforesaid.

The first point made against him was that, as his marriage with the petitioner had been dissolved in consequence of his misconduct, the present motion was one which he ought not to have made and ought not to be entertained by the Court. To which it was answered that the respondent's conduct, which led to the dissolution of the marriage, did not affect the present question, and that the petitioner's real reason for using the title was to annoy the respondent and not, as alleged in the

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letter of her solicitors above set out and in her affidavit, to retain the same name as her son. Upon this point, whatever view may be taken of the course adopted by the respondent in bringing forward this motion, it is necessary to observe that the Court has to deal with the rights of the parties whose marriage has been dissolved and who are now strangers to each other, and, in my opinion, the legal questions now raised do not depend on the cause which led to the dissolution of the marriage in this case. With regard to the suggestion of a desire on the part of the petitioner to annoy the respondent, it is to be noted that there is nothing in the evidence to shew that she is actuated by any such desire, though it seems strange that she should wish to use her former title in the circumstances, instead of her present legal name, and though the reason given by her for wishing to retain the same name as her son is one which it is difficult to appreciate, seeing that during his father's lifetime the son will neither have the name nor title of Cowley.

The main point made against the respondent was that the Court has no jurisdiction to grant the injunction asked for. This was based upon the cases which deal with the right of a person to assume any name he may choose, and upon the contention that the Courts will not interfere by injunction where the relations between the parties are strictly of a personal nature and no questions of proprietary rights are at issue. I have already pointed out the difference between the assumption of a name and of a title or dignity such as that in question. With regard to the contention last mentioned, it is to be observed that it overlooks the proprietary rights which the respondent has in his dignities.

He is entitled to share them with any lady whom he may make his wife, and, in my opinion, to assert that no other woman shall use the privilege which his wife should share with him.

It may be observed, further, that if the petitioner were to assert that she was still the wife of the respondent she would be subject to a suit in this Court for jactitation of marriage, which is founded on the injury which may be done to a com-

plainant by a person representing that he or she is the husband or wife, as the case may be, of the complainant: *Lord Hawke* v. *Corri*. (1) This is not the position asserted by the petitioner, yet she asserts that she is justified in describing herself in a manner which represents that she is still sharing his dignity with the respondent, and by a style and title which only fitly describes and can only be used lawfully by a person who is the wife of the respondent.

There has been, and is, in my opinion, an invasion by the petitioner of the respondent's rights. There is, in the legal sense, a wrong done to the respondent without lawful excuse, and intentionally, although an actual desire to annoy him is not established.

In conclusion, it is important to notice, upon this question of the power of the Court to interfere by injunction, that this is not a case in which a right is asserted by the petitioner to the dignity of a peerage. In cases of that character, the jurisdiction of the Crown is exercised on petition, which may be referred in the first instance to the Attorney-General for examination, and then, if necessary, to the House of Lords for investigation: Cruise, cap. 6. The facts of this case are not in dispute, and, if my view of the law be correct, there is no assertion by the Court of a jurisdiction to deal with a matter which should be considered elsewhere, and the remedy by injunction seems both applicable and convenient.

The result is that, in my judgment, there must be an injunction restraining the petitioner from using the style or title "Countess Cowley."

Solicitors for applicant: *Lewis & Lewis.*

Solicitors for petitioner: *Wontner & Sons.*

(1) (1819, 1820) 2 Hagg. Con. 280.

H. D. G.

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Dec. 11, 18;
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Jan. 29;
Feb. 19.

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Nullity — Impotence — Marriage Settlements—Petition for Variation—"Property Settled"—22 & 23 *Vict. c.* 61, *s.* 5—41 & 42 *Vict. c.* 19, *s.* 3.

The jurisdiction of the Court, conferred by the 5th section of the Matrimonial Causes Act, 1859, and extended by the 3rd section of the Matrimonial Causes Act, 1878, to inquire into the existence of ante-nuptial and post-nuptial settlements, and to make orders varying the same, is not limited to any particular class of nullity cases, but includes all cases in which a decree of nullity has been pronounced, upon whatsoever ground.

"Property settled," within the meaning of the two sections, refers only to that particular property the benefit of which is, by the marriage settlement, conferred in the ordinary way on the parties or their children, and does not extend to or include the whole estate of the respondent, out of which the "property settled" may have been carved and which may be all mentioned in the schedules appended to the marriage settlement.

The Court has no power to bring into the settlement a fund or estate which is not to come into settlement until a certain event shall happen, before that event happens in fact.

Motion by the petitioner in opposition to registrar's report upon a petition for variation of settlements, after a decree of nullity by reason of the respondent's impotence.

Bargrave Deane, Q.C., and *Danckwerts, Q.C.*, for the petitioner.

Jelf, Q.C., *R. J. Parker*, and *Priestley*, for the respondent.

Cur. adv. vult.

Gorell Barnes J. Two questions are raised in this case: one of general importance, namely, as to the construction of two sections of the Matrimonial Causes Acts of 1859 and 1878, and the other depending upon the terms of an ante-nuptial settlement made on the marriage of the petitioner and respondent and dated May 27, 1885.

The parties were married on May 28, 1885, the petitioner being then under age, and afterwards they resided together; but on October 22, 1895, the petitioner commenced a suit in this Court against the respondent, claiming a declaration that

her marriage was null and void on the ground of the impotence of the respondent.

The suit was heard before the President, and a decree nisi was pronounced by him on December 21, 1896, and this decree was made absolute on June 28, 1897. The petitioner on June 12, 1899, by leave, presented a petition to the Court under the said Acts to obtain a variation of the settlement for her benefit. The petition having been referred to Mr. Registrar Pritchard, he reported that the respondent raised, amongst other points, the question of the jurisdiction of the Court to vary settlements in the case of a marriage declared void by reason of impotence; and thereupon the matter was brought before the Court, and the questions which I have now to decide were, by arrangement, argued before me.

The first point taken by the respondent was that the powers of the Court conferred by the two sections could not be exercised in the case of a decree of nullity of marriage on the ground of impotence, and that the sections only applied to cases where there were, or might have been, children. The 5th section of the Act of 1859 (1) is as follows: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

It was decided in the case of *Thomas* v. *Thomas* (2) that this clause gave no power to the Court to deal with settlements in cases where no child of the marriage had been born; and in the cases of *Bird* v. *Bird* (3) and *Corrance* v. *Corrance and Lowe, Moore Intervening* (4) that the Court, had no power to do so unless there was issue of the marriage living at the time of the application.

(1) The Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5.

(2) (1860) 2 Sw. & Tr. 89.

(3) (1866) L. R. 1 P. & M. 231

(4) (1868) L. R. 1 P. & M. 495.

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These decisions turned on the use of the word "parents" in the latter part of the section, and the criticisms on the judgments in those cases apparently led to the passing of the 3rd section of the Act of 1878 (1), which is in the following terms: "The Court may exercise the powers vested in it by the provisions of section five of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage."

The argument for the respondent was that, as under the 5th section of the earlier Act the powers of the Court could only be exercised when there was issue of the marriage living at the time of the application, the marriages referred to in the words in the first part of the section, "final decree of nullity of marriage or dissolution of marriage," must be marriages capable of being productive of children, and that the 3rd section of the later Act, in extending the powers of the Court to cases where there are no children of the marriage, only did so with reference to the class of marriage contemplated by the 5th section of the Act of 1859.

This argument is ingenious, but, in my opinion, endeavours to place a restricted meaning on the first words of the 5th section which they never were intended to bear.

In my opinion the words "final decree of nullity of marriage or dissolution of marriage" are used in their ordinary meaning, just as they are in other sections of the Matrimonial Causes Acts, and apply to any marriage declared null or dissolved.

The section then meant that the Court after any decree of nullity of marriage or dissolution of marriage might inquire as to the existence of settlements, and then, if there was issue living, might make orders as contemplated by the latter part of the section; and now under the 3rd section of the Act of 1878 these orders may be made although there is no issue of the marriage. I am of opinion that, under the two sections combined, the Court has jurisdiction in this case to deal with the settlement in question.

The point raised by the respondent upon the terms of the settlement was that, having regard to the terms of the settle-

(1) The Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3.

ment, there is no property settled which, in the events which have happened, the Court can or should in the circumstances order to be applied for the benefit of the petitioner.

Under an indenture of settlement dated December 8, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of May 27, 1885, together with other hereditaments, were limited (subject, as to part, to a jointure rent-charge of 1200*l.* payable thereout to the respondent's mother during her life, and to a term of 500 years for securing the same) to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will or any codicil or codicils thereto, from time to time appoint, but subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and, subject thereto, to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over; and in the same indenture was contained a power for the respondent, after his father's decease, by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding 8000*l.* and interest, as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same. This power had not at the time of the marriage settlement been exercised. In the same indenture was also contained a power for the respondent, either before or after his marriage with any woman, by deed with or without power of revocation and new appointment or by will or codicil to appoint to any woman whom he might marry, for life or for any less period, as from the day of his death if she should survive him, any yearly rent-charge or rent-charges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rent-charge or rent-charges to be in bar or not to be in bar of dower and freebench, as to the

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respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assured without any deduction, and to be paid at such times and in such manner as to the respondent should seem meet, and to appoint to such woman usual powers and remedies for recovering and enforcing the same, and to appoint the premises so charged to any person or persons for any term or terms of years with or without impeachment of waste, upon trust for better securing payment of the rent-charge or rent-charges by mortgage (with a power of sale if thought fit) or otherwise as to the respondent should seem fit.

By the marriage settlement made between the respondent, the petitioner, her father, and certain trustees, the respondent, in consideration of the intended marriage, covenanted with the trustees that if the said intended marriage should take place the respondent would, during the joint lives of himself and the petitioner, pay to the trustees a yearly sum of 200*l.* to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnization of the said intended marriage, and the trustees were to pay the said annual sum of 200*l.* as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation. And in consideration of the intended marriage, and in exercise of the special power vested in him by the indenture of settlement, the respondent limited and appointed to the use of the petitioner and her assigns during her life, in case the intended marriage should take effect and she should survive him, the rent-charges following, that is to say, if and so long as his mother should be living, the yearly rent-charge of 1300*l.*; and from and after her death the yearly rent-charge of 1600*l.*, the said rent-charges or such of them as should take effect to be in full for her jointure and in lieu of all dower and freebench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto (subject, as to part of the said hereditaments, to the said yearly rent-charge of 1200*l.* and the said term of 500 years,

and subject, as to all the said hereditaments, to the powers of leasing and sale and exchange and management contained in the indenture of settlement), such rent-charges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments as to the said rent-charge of 1300*l.* to be paid at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the said rent-charge of 1600*l.* to be made at the end of three calendar months after the death of the survivor of the respondent and his mother if the petitioner should then be living. And in consideration of the intended marriage and in exercise of the special power vested in him for that purpose by the indenture of settlement, the respondent, as beneficial owner, appointed the hereditaments and premises thereinbefore charged with the jointure rent-charges (subject nevertheless as last aforesaid) unto and to the use of the trustees for the term of 1000 years, to commence from the death of the respondent, to secure the payments of the said rent-charges. And, in consideration of the intended marriage and in exercise of the general power of appointment vested in him by the indenture of settlement and of all or any other power in that behalf him enabling, the respondent, as beneficial owner, appointed the hereditaments and premises comprised in the second schedule to the marriage settlement to the use of the trustees for the term of 1200 years, to commence from the solemnization of the intended marriage, without impeachment of waste (but subject as therein mentioned), upon trust to raise the sum of 20,000*l.* with interest for the same at 4 per cent. per annum computed from the solemnization of the intended marriage, and to stand possessed thereof upon trust for investment and to pay the interest and annual produce to the respondent and his assigns during his life ; and after his decease, as to the corpus of the fund and the annual produce thereof, in trust for the issue of the marriage as the respondent should appoint, and in default as the petitioner should after the respondent's death appoint, and in default for the children equally except as in the deed provided, and, in default of issue

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attaining a vested interest, in trust for the respondent. The deed contained a proviso that no part of the 20,000*l.* or of the interest thereof should be raised during the lifetime of the respondent except with his consent in writing.

The respondent's mother is now dead. The petitioner's application is that by some form of order the marriage settlement should be varied so that the petitioner should receive at once a considerable allowance. The principal argument in favour of the petitioner to meet the point raised by the respondent was that the whole of the hereditaments and premises comprised in the schedules to the marriage settlement were property settled by that settlement, and that the Court could, therefore, under the terms of the 5th section, which gives the Court power to make orders with reference to the application of the whole or a portion of the "property settled" for the benefit (by the effect of the 5th section of the Act of 1859, and the 3rd section of the Act of 1878) of children or parties, order that the whole or a portion of the said hereditaments and premises be applied for the benefit of the petitioner. The petitioner's counsel, while maintaining that the whole of the hereditaments and premises could be applied by the Court for her benefit, did not contend that the Court, in its discretion, would apply the whole of this property for her benefit.

The respondent, no doubt, had practically a complete power of disposition over the estates in this case when he entered into the marriage settlement subject to the mother's interest; but by that settlement he only affected the estates by creating two charges, one on one part of them and the other on the other part; and it seems an extraordinary proposition that because a charge—it may be a very small one—is created on a large real estate by a marriage settlement, the whole estate can be dealt with by the Court under the powers created by the sections aforesaid.

In my opinion the words "property settled" have not the meaning contended for, but refer to the property the benefit of which is by the marriage settlement conferred on the parties or their children in the ordinary way.

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Several cases were cited in argument on this point; but they do not appear to me to be of much assistance, except perhaps the case of *Micklethwait* v. *Micklethwait* (1), the judgments in which are in favour of the respondent: see especially page 858 of the volume.

It is, therefore, necessary to refer to the terms of the settlement, the substance of which I have set out above, to see what was really dealt with by the settlement.

Now, first, there is the covenant to pay 200*l.* a year to trustees for the benefit of the petitioner. The point made by the respondent with regard to this was that the covenant was either still in force or was at an end, and that if it were in force there was no necessity for this application, while if it were not in force, either because the marriage had been declared void and therefore had not taken place within the meaning of the covenant, and because there was thus no consideration for the covenant, or because the covenant had come to an end and ought to be read as applicable only to the petitioner if she were the respondent's wife in consequence of the clause as to anticipation, then there was now no property, so far as this covenant is concerned, upon which the Court could make an order.

The only answer made by the petitioner's counsel was that the covenant was in force, and that the Court ought to enforce it.

Well, if so, it must be enforced by the trustees in the ordinary way, and there is no necessity for this application; and, if it is not in force, there is nothing existing as to the application of which the Court can make an order.

The case of *Worsley* v. *Worsley and Wignall* (2) was cited for the petitioner, but it does not bear on the present case. In that case there was a separation deed between the husband and wife, and the husband afterwards obtained a decree of divorce. He then applied to the Court to reduce the amount of his covenant in the deed; and the Court did so, holding the deed to be a post-nuptial settlement.

There appears to have been no clause in the deed providing for the event which happened, namely, the unfaithfulness of

(1) (1858) 4 C. B. (N.S.) 790. (2) (1869) L. R. 1 P. & M. 648.

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the wife, and it was assumed that the provisions of the deed could be enforced to the full extent unless the Court reduced the payment.

The next subject-matter which can be considered as property settled by the marriage settlement is the jointure rent-charge, limited and appointed to the petitioner, and the term of 1000 years to secure it.

The point made by the respondent was that no order could be made as to the application of this, because, in the circumstances, it was not property which could be dealt with.

The reasons suggested for this were, first, that the jointure rent-charge and term could only come into force if the marriage should take effect, and that as the marriage has been declared void it did not take effect and the jointure rent-charge and term cannot come into force, and the settlement was without consideration. The cases of *Chapman* v. *Bradley* (1) and *Pawson* v. *Brown* (2) appear to me to support these reasons.

The answer made by the petitioner's counsel was mainly the principal point above mentioned—that the property settled included all the estates mentioned in the schedules to the marriage settlements. I have already dealt with this point.

But it was further urged that the marriage was not void, but voidable, and that it had taken effect. The petitioner had the right to elect whether to treat the marriage as void or not, and, at her instigation, it has been declared void, and, in my opinion, has not taken effect within the meaning of the deed.

The second reason in support of the respondent's point was that the jointure and term could not commence till after the death of the respondent, and this seems clear upon the terms of the deed. It was, however, strenuously urged for the petitioner that it was common practice for the Court to order a settlement to be read as if a party to it were already dead, and that it could do so in this case.

This argument was, in my judgment, based on a misconception. It is true that in certain cases, for instance, where property is settled in trust for a respondent for life, and after his or her death for a petitioner for life with remainder to

(1) (1863) 4 D. J. & S. 71. (2) (1879) 13 Ch. D. 202.

children, and in default of children in trust for the settlor, and in other similar cases, it is found convenient, instead of an order in terms directing the trustees to pay the income at once to the petitioner, to effect the same object by ordering the life interest of the respondent to be extinguished as if he or she were already dead. But the important question in the present case is whether there is any property settled. If property is only to come into settlement upon the death of a person, no order of the Court can bring it into settlement before that time. There is no power to bring into settlement a fund or estate which is not to come into settlement until a certain event happens—before it happens in fact. Therefore no order as to the application of this jointure could have any effect before the death of the respondent. Moreover, before the trustees could act upon an order as to the application of the jointure they would have to recover the money, and, in the circumstances which have happened, namely, the marriage not having taken effect, the respondent being alive and the purposes for which the jointure was created—that is to say, to provide for a widow—being impossible of performance, I am unable to see how the trustees could enforce the security.

With regard to the power to raise the 20,000*l.*, though the wording as to the commencement of the term of 1200 years is not quite the same as in the case of the jointure rent-charge, the consideration is the marriage, and the term is to commence from the solemnization thereof; and, as the marriage has been declared void, for similar reasons to those given with regard to to the jointure rent-charge, the fund has not, and will not, become property which the Court can deal with. Moreover, this fund cannot be raised during the lifetime of the respondent except with his consent in writing, which has not been given, and therefore the fund has not yet come into existence; and, after his death, I do not see how the trustees could be compelled to raise the fund, except for the benefit of children if there had been any.

The broad position in the case appears to me to be that no property was transferred to and vested in trustees at the time of the marriage in the way in which this is commonly done under

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a marriage settlement, and that, unless the estates themselves can be treated as having been "property settled" within the meaning of the section, there is no property as to the application of which the Court can, or ought to, make an order. As I have already said, the estates cannot, in my opinion, be so treated. They were not property settled by the marriage settlement, which only purported to carve out of them (so to speak) certain interests which, in the events that have happened, have not come into existence. I suggested, in the course of the case, that a settlement between the parties was desirable, as the petitioner is without means and the respondent is wealthy, and the case stood over more than once with the view to an arrangement; but the respondent finally expressed himself as unwilling to make any proposal while legal proceedings are taken against him; and therefore the matter was fully argued; and I have now to deal with the case according to the legal principles applicable to it. For the reasons which I have given, the petition for variation of the settlement must be dismissed.

Solicitors for petitioner: *Witham, Roskell, Munster & Weld.*
Solicitors for respondent: *Few & Co.*

H. D. G.

Not followed. KARA *v.* KARA AND HOLMAN. [1948] P. 287

MEDWAY *v.* MEDWAY.

1900
Feb. 6.

Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Husband's Appeal—Case remitted to Justices—Wife's Costs—Practice.*

Where a wife has obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, she is entitled to her costs of supporting that order upon appeal, even though she should prove unsuccessful in the Divisional Court.

A husband and wife separated in 1887, when a document headed "Memorandum of Agreement" was signed by them and witnessed by a solicitor. Twelve years later the wife returned from abroad, went to her husband's house, and was refused admission. She thereupon took out a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with neglect to maintain her, and by such neglect causing her to leave and live separate and apart from him. The husband and wife were the only witnesses before the justices, who made an order for separation and allowance in favour of the wife.

Upon appeal:—

Held, that as the document was conclusive one way or the other, and as the justices had not had all the evidence before them to enable them properly to test its validity, the case must go back for rehearing; but the appellant was ordered to pay the respondent's costs on the appeal.

APPEAL by the husband from an order of justices of Kent, sitting at Ashford, on December 27, 1899, whereby the wife obtained a separation and allowance of 10*s.* a week.

The grounds of appeal were that there was no evidence that the appellant had wilfully neglected to provide reasonable maintenance for his wife, and by such neglect had caused her to leave and live separately and apart from him; that there was evidence to shew that the appellant and respondent were living apart under an agreement for a separation; and that the complaint had not been made within six calendar months from the time when the matter of complaint arose.

The "Memorandum of Agreement," which bore a 6*d.* stamp, was dated July 23, 1887, and purported to be witnessed by Mr. Theophilus M. Reed, solicitor, of Bridgwater.

It recited unhappy differences and the consequent agreement of the parties to live separate for the future and to enter into such agreement as was thereinafter expressed. It proceeded to state that the husband had agreed to pay to his wife the

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sum of 20*l.* and to give her the custody of their only child; and it witnessed that in pursuance of the agreement, and in consideration of the sum of 20*l.* paid by the husband to his wife on the signing of the document, the receipt whereof was thereby acknowledged, the husband covenanted with his wife that she might at all times thereafter, notwithstanding her coverture, live separate and apart from him as if she were a feme sole, and that he would not take proceedings to compel her to live with him and would not in anywise molest or interfere with her in her manner of living or otherwise. For the consideration aforesaid the wife, on her part, covenanted not to molest him at any time or in any manner. There were also clauses as to custody and access in relation to the child.

The only witnesses called at the hearing of the summons were the husband and wife.

Barnard, for the appellant. The justices possibly made the order because the appellant was living in adultery, which is not one of the grounds given by the Legislature. The complaint was not laid on the ground of desertion. By s. 8 of the Act of 1895 (1) the Summary Jurisdiction Acts are brought into force, and the complaint must be made within six months from the time when the offence was committed. (2) This Court has held that the statutory offences are not continuing offences: *Ellis* v. *Ellis*. (3)

[THE PRESIDENT. She came back, after being in America for some years, went to her husband, and he turned her out, or, rather, would not let her in.]

(1) 58 & 59 Vict. c. 39, s. 8, is as follows: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and, in the case of a conviction of a husband for aggravated assault upon his wife, her application may, by leave of the Court, be made by summons to be issued and made returnable immediately upon such conviction."

(2) By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

(3) [1896] P. 251.

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The parties had been living apart by mutual agreement, and her complaint is that he "caused her to leave and live separate and apart from him." She left him by agreement in 1887, and never returned till 1899. His refusal to receive her after twelve years' absence is not "causing her to leave and live separately and apart from him." Some part of the consideration money she admits was paid, and if it be the fact, as she states, that the whole was not paid, that is no answer to the agreement.

Macoun, for the respondent. The evidence was that the solicitor told the parties in 1887 that the agreement was not worth the paper it was written on. The document ought to bear at least a 10*s*. stamp.

Barnard, in reply. It is only a memorandum for an agreement. It is absurd to suggest that two people signed such a document knowing it was of no effect. But, at the very least, it is strong corroboration of the appellant's statement that he and his wife agreed to separate, as in fact they did in 1887, and that he paid her money at the time.

JEUNE P. In my judgment, this agreement lies at the root of the whole matter. The only ground of complaint in this case is that the appellant wilfully neglected to provide reasonable maintenance for the respondent, and by such neglect caused her to leave and live separately and apart from him. If the charge was intended to be that he did that in 1887, an application founded thereon would be out of time. *Ellis* v. *Ellis* (1) decided that point, and I think rightly decided it. Therefore, unless there was some other occasion upon which the ground of complaint can be justly fastened, the application of the respondent must necessarily fail. But that depends upon the memorandum of agreement. If it be the case that the respondent left her husband by mutual consent, but only temporarily—if it was not settled between them in 1887 that there was to be a final separation, I do not see why she necessarily forfeited her right, at any time when that temporary arrangement came to an end, to return to him; and when she did return and he shut the door in her face, it may fairly be

(1) [1896] P. 251.

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contended that, at that time there was neglect by him to provide maintenance for her, and that by such neglect he caused her to leave and live separately and apart from him. It all depends upon the agreement. I am reluctant to say that the justices who saw the parties and heard them give their evidence were wrong in accepting the wife's story, extraordinary though it be, as against that of the husband. But the justices had not all the evidence before them; they had not the solicitor who attested the document, and whose evidence should be conclusive. If he, being called as a witness, were to say that the consideration money was paid, and if he were to deny saying that the document was not worth the paper it is written on, that would be conclusive against the wife on this summons. I think, therefore, that this case must be remitted to the justices, with the expression of opinion that the document is conclusive, one way or the other, when the whole available evidence as to it shall have been given. If the document is invalid, then, in my opinion, the wife has a good ground of complaint; if valid, the husband has a complete answer.

GORELL BARNES J. I am of the same opinion. I think it is impossible to decide this case properly without knowing whether this is a binding agreement or not. Although the justices have decided upon the evidence of the wife that it is not, it is, in my judgment, desirable that the case should be sent back to them in order that the whole of the evidence on the subject may be given.

Macoun asked for the respondent's costs.

JEUNE P. The rule we have before acted upon, and which we intend to lay down, is that, where a wife has obtained a decision in her favour and comes here to support it, she ought to have her costs. The appellant must, therefore, be ordered to pay the costs of the respondent upon this appeal.

Solicitors for appellant: *Riddell & Co., for Lewis & Pocock, Cardiff.*

Solicitor for respondent: *B. Walker Kemp.*

H. D. G.

COBB *v.* COBB.

1900
Feb. 6.

Practice—Appeal — Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39)*—Notes of Proceedings in Court below—Duties of Magistrates' and Justices' Clerks—Right of either Party to a Copy of Notes.*

Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the magistrate or justices to make a note, not only of the evidence and of the decision arrived at, but also of the reasons for arriving at the decision, and to furnish a copy of the note upon the application of either party.

THIS was a second appeal by the husband, the case having, on the former appeal, been remitted to the justices for them to hear it properly.

Torr, for the appellant, complained that great trouble and difficulty had been met with, owing to the refusal of the clerk to the justices to supply his client's solicitors with a copy of the note of the proceedings in the Court below, so that the solicitors might furnish it for use of the Divisional Court on this appeal.

[GORELL BARNES J. He ought to have supplied a copy of his notes without any question.]

Priestley, for the justices. The clerk was threatened with pains and penalties for refusing, and he was told by the justices that he was not obliged to supply a copy of his notes.

Torr. Application had to be made to the President of this Court before a copy of the notes could be obtained by the appellant's solicitors; and then, after an intimation from the bench (the justices' clerk having taken the opinion of counsel), a copy was at last obtained, after considerable trouble and expense had been incurred.

[He then proceeded to deal with the merits of the case on appeal.]

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Waddy, for the respondent.

Torr, in reply.

JEUNE P., after dealing with the subject-matter of the appeal, said:—I must add that I earnestly trust there will never be in future any difficulty about the notes taken by clerks to justices in these cases. It was the duty of the clerk in this, as in every case, to furnish a copy of the notes on the application of either party. Unless notes are taken and furnished, the Act would be unworkable, for it would be impossible for us, without the notes, to do justice between the parties upon these appeals. I am glad to say that in most cases no difficulty has arisen, the magistrates' clerks having performed their duty efficiently and well. In the present case the clerk appears to have been under some mistake or misapprehension. He confused an application which could be enforced by order of the Court with a duty which he ought to perform. He disputed with the husband's solicitors when they applied for a copy of his notes as to whether a mandamus would lie to compel him to furnish them. He took up an attitude which produced an unfortunate result, and which has given rise to some trouble and, I am afraid, to needless expense. I hope that in future he and all other magistrates' clerks will furnish, for the use of the judges of this Court and for the use of the parties upon these appeals, copies of the notes which constitute, primâ facie, the best evidence of what has occurred in the Courts below. I am reminded that I should state again, so that no misunderstanding should arise in future, that the notes to be taken and furnished by magistrates' clerks on the hearing of all applications under the Act of 1895 are to include not merely the evidence but the decision; and, further, the notes should state the reasons of the justices for arriving at their decision. Clerks to magistrates or justices are best able in these cases to note the decisions and the reasons for arriving thereat. Therefore, in view of the right of appeal to this Court given by the Act, it is the duty of the clerk to the magistrate or justices in each case to make at the time a note, and to furnish, when properly required, a copy of that note, containing the

evidence given, the decision arrived at, and the reasons which led thereto.

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COBB v. COBB.

GORELL BARNES J. I entirely agree.

Appeal dismissed with costs.

Solicitors for appellant: *Peat & Mandell.*

Solicitors for respondent: *James & Mellor, for Hobbs & Brutton, Portsmouth.*

Solicitors for justices: *Shield & Mackarness, Petersfield.*

H. D. G.

WALTON *v.* WALTON.

1900

Feb 6.

Practice—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.* c. 39)—*Appeals—Notes of Proceedings in Court below—Copies required for Use of Divisional Court—Costs—Taxation.*

Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the appellant to furnish, for the use of the judges of the Divisional Court, two copies of the notes taken by the clerk of the Court below, and the costs of these copies will be allowed on taxation.

APPEAL from an order made under the Summary Jurisdiction (Married Women) Act, 1895.

Barnard, for the appellant, was proceeding to open the appeal.

JEUNE P. Only one copy of the notes taken by the clerk in the Court below has been supplied for our use. I wish it to be known in future that two copies are required, and should be furnished in every case by the appellant. The costs thereof will be allowed on taxation.

GORELL BARNES J. I quite agree. I have had no opportunity of reading the notes of any cases in to-day's list, owing

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to the practice of supplying only one copy in each case for the use of the Divisional Court. Two copies should always be supplied.

Solicitors: *Pitman & Sons.*

H. D. G.

C. A.

1900

March 12.

[IN THE COURT OF APPEAL.]

BAGSHAW *v.* PIMM.

Probate—Practice—Costs—Good Cause—Probate Action—Action tried with a Jury—Severance of Defences—Separate Sets of Costs—Rules of Supreme Court, Order LXV., *r.* 1.

An action to establish the third, and, alternatively, the second, will of a testator, was separately defended by the executors of the first will and two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The jury found that the execution of the two last wills was obtained by undue influence, and the judge pronounced against them and for the first will:—

Held, that there was a sufficient divergence of interest between the defendants to justify the legatees in appearing by separate counsel, and that, consequently, there was no good cause for depriving them of the costs of their separate appearance.

Decision of Gorell Barnes J. reversed.

APPEAL from a decision of Gorell Barnes J.

The plaintiffs as executors propounded the last will, dated April 2, 1898, of Timothy Pimm, deceased. The defendants, James Pimm and his son George Wootten Pimm, who were respectively a brother and a nephew of the testator, claimed to be the executors of a will dated August 10, 1895, and the defendants, Anne Augusta Jackson and Gertrude Elizabeth Furniss, claimed to be legatees thereunder. The defendants pleaded (inter alia) that the execution of the will of April 2, 1898, was obtained by the undue influence of the testator's brother Frederick Pimm, and they propounded the will of August 10, 1895. The plaintiffs joined issue and set up a will

of March 17, 1898, which the defendants impeached upon the same grounds as the will of April 2, 1898.

The two first defendants and the two last defendants delivered separate defences (which were in almost identical terms), and appeared at the trial by separate counsel.

By the will of August 10, 1895, the testator devised a house at Langley to the two first defendants as tenants in common in fee, and bequeathed a legacy of 80*l.* each to the two last defendants and two other persons, and he divided his residuary estate between his brothers James, the first-named defendant, and Frederick.

By the will of March 17, 1898, he devised the house at Langley to the defendant James Pimm in fee, and gave his residuary estate to Frederick Pimm.

By the will of April 2, 1898, the testator devised the house at Langley to the defendant James Pimm for life with remainder to Frederick Pimm in fee, and gave his residuary estate to Frederick Pimm.

The action was tried before the learned judge and a common jury. The jury found that the execution of the two later wills was obtained by the undue influence of Frederick Pimm, and the judge accordingly pronounced against the two later wills and for the will of August 10, 1895. Upon the taxation of the costs the registrar declined to tax the costs of the two last defendants upon the ground that their interests were fully protected by the two first defendants, the executors; but he directed that any extra costs incurred by the two last defendants in getting up evidence material to the case should be added to the bill of costs of the two first defendants; and this decision was affirmed by the judge in chambers. The learned judge was of opinion that there was good cause to deprive the two last defendants of their costs, as it was the rule only to allow defendants in a probate action one set of costs unless it could be shewn that their interests would suffer or that new points had been raised, and that was not so in the present case. The two last defendants, having obtained leave to appeal from the Court of Appeal after leave had been refused by the learned judge, appealed.

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W. G. Clay, for the appellants. The two first defendants did not sufficiently represent the interests of the appellants, since it was practically a matter of indifference to them whether the will of August 10, 1895, or the will of March 17, 1898, prevailed, whereas the appellants were equally interested in upsetting both the wills set up by the plaintiffs. There being, therefore, a possibility of divergence of interest between the defendants, the appellants were entitled to appear by separate counsel and ought to be allowed the costs of their separate appearance: *Tennant* v. *Cross*. (1)

Inderwick, *Q.C.*, and *Hextall*, for the respondents, the plaintiffs. Where a will is propounded by the plaintiffs and their claim is contested by the executors of a prior will, legatees under that will ought not to be allowed to deliver separate defences and charge the costs against the plaintiffs or against the estate, as the case may be. It is a good cause for depriving the appellants of their costs that their interests were sufficiently protected by the executors. This case is reported in the Court below upon the question whether the appellants' counsel ought to be heard. (2) The learned judge held that he ought not to be heard, and the natural consequence of that is that they ought not to be allowed the costs of being separately represented. In *Rayson* v. *Parton* (3), which was a testamentary suit by the executor of a will against one of the next of kin, the heir-at-law who intervened was allowed his costs, but the ground of that decision was that by intervening the heir-at-law saved the costs of a separate suit, and it was an advantage to all parties that the area of litigation should be limited. That case shews how widely the circumstances which will induce the Court to allow defendants in a probate action separate sets of costs differ from the circumstances of the present case.

[They also cited *In re Gilbert, Gilbert* v. *Hudlestone* (4); *Stevenson* v. *Abington* (5); *In re Isaac, Cronbach* v. *Isaac*. (6)]

(1) (1886) 12 P. D. 4.
(2) (1899) 80 L. T. 360.
(3) (1869) 2 P. & M. 38.
(4) (1885) 28 Ch. D. 549.
(5) (1863) 8 L. T. (N.S.) 719.
(6) [1897] 1 Ch. 251.

Clay, in reply. The difficulty in this case is caused by the plaintiffs having set up two wills.

LINDLEY M.R. The plaintiffs by setting up two bad wills have brought this controversy on themselves. At first I thought that the case for the will of 1895 could have been properly fought out by the executors, and that there was no necessity for the appellants to appear and see that nothing went wrong; and the result shews perhaps that they might have left the defence of the action to the executors. But I do not think that that is conclusive. The question is whether they were really justified in separately appearing to protect their own interests. I have come to the conclusion that they were, because, although it is true that the two Pimms were the executors of the will of 1895, nevertheless there was such a divergence of interest between the Pimms on the one hand and the appellants on the other, that if any difficulty arose the executors might have preferred to compromise on the footing of the will of March 17, 1898, being allowed to stand. That, in my opinion, is sufficient to justify the appellants in appearing by separate counsel. It does not at all follow that the Court would allow the costs of appearing separately, however many defendants there might be; but in this case counsel for the appellants has succeeded in convincing me that there was no sufficient cause for depriving them of their costs. I may add that the plaintiffs in setting up two bad wills deserve no sympathy from the Court. I think that the learned judge in the Court below has come to an erroneous conclusion; and, inasmuch as I think that the appellants' separate appearance was only cautious, and not in any way oppressive or embarrassing, they ought not to be deprived of their costs. The appeal must be allowed.

RIGBY L.J. I am of the same opinion. I think that, without imputing to the executors of the will of 1895 any intention of throwing over the case of the appellants, it might fairly be said that, looking to the interests of the parties, it might suit

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them better in certain events to allow the will of March, 1898, to be set up.

VAUGHAN WILLIAMS L.J. I am not at all prepared to say that the solicitor for the appellants did not exercise a very wise discretion when he advised them to appear separately from the other defendants, the executors. If that is so, how can we possibly say that their appearance occasioned to these plaintiffs any unnecessary expense of litigation? If we cannot say that, there is no reason for depriving them of their costs.

Appeal allowed.

Solicitors: *L. B. Braund, for Francis J. Walmsley, Derby; Few & Co., for J. & W. H. Sale, Derby.*

H. B. H.

1900

Feb. 12.

IN THE GOODS OF MARY MOFFATT.

Probate—Practice—Administration with Will annexed—Foreign Domicil—Next of Kin out of the Jurisdiction—Assets and some Beneficiaries in England—No Executor—Grant to Stranger without Citing Next of Kin—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The testatrix, who died domiciled in the Republic of Hayti, left a will which was valid by the law of her domicil, but not executed with the formalities prescribed in the Wills Act. There was no appointment of executors, but the will contained the words: "M. E. Bordu of Port-au-Prince and Mr. J. B. Wallace of Liverpool shall carry out my last wishes."

The only estate in England consisted of a sum of 1260*l.* 7*s.* 11*d.* in the hands of Mr. Wallace's firm.

The sole next of kin, who was entitled in distribution to half the fund, was in Hayti and had not been cited; but the persons entitled to the other half were in England, and assented to Mr. Wallace being appointed administrator with the will annexed.

The Court appointed Mr. Wallace administrator (with the will annexed) under s. 73 without requiring the next of kin to be cited.

MOTION for administration, with certified copy of Haytian will annexed, to be granted to J. B. Wallace, under s. 73 of the

Probate Act, 1857, without citing the sole next of kin, who resided in Hayti.

Marion Moffatt, late of Port-au-Prince, in the Republic of Hayti, died domiciled there on August 16, 1899, a spinster, without parent or brother, leaving Isabella Love, of the same place, her sister (and only next of kin), and three nieces and two nephews (children of a deceased brother), the only persons entitled in distribution in case she died intestate.

On February 20, 1897, the deceased duly made and executed a holograph will in accordance with the forms required by the laws and constitutions of the Republic of Hayti, but not in accordance with the Wills Act. The deceased appointed no executor or residuary legatee, but the will contained (inter alia) the following words: "M. E. Bordu of Port-au-Prince and Mr. J. B. Wallace of Liverpool shall carry out my last wishes." Mr. J. B. Wallace had for a period of twenty years managed the affairs of the deceased in this country. The nephews and nieces, all of whom resided in this country, had given a written consent to the grant being made in favour of the applicant. The only assets in England consisted of a sum of 1260*l.* 7*s.* 11*d.* in the hands of Mr. Wallace's firm.

The will had been duly authenticated by the senior member of the Civil Tribunal of Port-au-Prince, and was registered at that place on November 6, 1899.

R. H. Pritchard, on behalf of Mr. J. B. Wallace, moved for a grant to him, under s. 73, of administration with a certified copy of the will annexed. As the sister resides in Hayti, it would entail considerable expense and delay to cite her, and, if she were to take the grant, the money would have to be remitted to her while the persons entitled in distribution to one moiety of the money are here. The intention of the testatrix clearly was that the applicant should be one of the persons to wind up her estate, and, if the document had been an English will, the applicant would have been an executor according to the tenor. *In the Goods of Briesemann* (1) is somewhat analogous to, but not on all-fours with, the present case, because

(1) [1894] P. 260.

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MOFFATT, IN THE GOODS OF.

the persons appointed in that instance were, according to the affidavit of the (German) legal expert, persons who would be held, by the law of the testator's domicil, to be in some sort of way executors in this country.

JEUNE P. I see no objection to appointing the applicant. That will best carry out the terms of the will.

Solicitors: *Pritchard & Sons, for North, Kirk & Cornett, Liverpool.*

H. D. G.

1900
Feb. 26.

IN THE GOODS OF WILLIAM LOVEDAY.

Practice—Administration de bonis non—Former Administratrix—Disappearance—Revocation of Grant—Fresh Grant to one of the Next of Kin.

The practice by which a grant of administration may be revoked and a fresh grant made in the absence of the holder of the outstanding grant, is not confined to cases where administration has been taken by creditors.

Where an intestate died leaving a widow and six children by a former marriage, and the widow, who obtained administration, could not be found, the Court, upon the application of the children, revoked the grant and directed administration de bonis non in favour of one of their number.

MOTION by next of kin for revocation of an outstanding grant and for a fresh grant de bonis non.

William Loveday died intestate on April 23, 1885, in London, leaving his widow and six children by a former marriage, all sui juris, him surviving.

On May 21, 1885, administration was granted to the widow, who swore that the gross value of the personal estate was 258*l.* 8*s.* 2*d.*

By an order made in the Chancery Division on March 22, 1899, a sum of 173*l.* 8*s.* 9*d.* was payable to the legal personal representative of William Loveday.

Every effort had been made to trace the administratrix, but she had not been found.

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LOVEDAY, IN THE GOODS OF.

The six children desired that a grant de bonis non should now be made to James Loveday, one of their number.

Willock, for the applicants. The applicants do not wish to swear that the widow is, in fact, dead, though they believe that this must be the case. They have advertised for her without result in the *Daily Telegraph*, *Daily Chronicle*, and *Islington Gazette*. The present form of application is a roundabout way of presuming the death of the widow, and there is no authority precisely in point, though several reported cases go rather near. [He referred to *In the Goods of Covell* (1), *In the Goods of Callicott* (2), and *In the Goods of Bradshaw*. (3)]

JEUNE P. I think I can see my way, although I feel that I am going a little beyond decided authorities, to revoke the grant in this case and make a fresh grant in favour of the applicants.

As far as I can find, from the reported cases, there is no distinct authority that covers the present application; but in the case of *In the Goods of Covell* (1) Butt J. appears to have revoked a grant previously made to a residuary legatee and made a fresh grant de bonis non in favour of another residuary legatee. That was done on the authority of several cases where creditors had been appointed by the Court, and, they having failed to carry on the administration, a grant was made to somebody else in their stead.

In the recent case of *In the Goods of John Callicott (otherwise William Smith)* (2), where there was a doubt as to who was in fact the next of kin, I followed an earlier case of *In the Goods of Reed* (4), where Sir James Hannen allowed the applicant, who was the intestate's mother, to take the grant, upon her oath that she *believed* herself to be the sole next of kin. But in that case, though I thought I was going a little beyond the general practice, I had not to deal with an outstanding grant.

Of course it may be said that creditors who apply for grants

(1) (1889) 15 P. D. 8.
(2) [1899] P. 189.
(3) (1887) 13 P. D. 18.
(4) (1874) 29 L. T. (N.S.) 932.

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LOVEDAY, IN THE GOODS OF.

The President.

stand in a somewhat different position from residuary legatees or next of kin, because, inasmuch as they are specially appointed by the Court, the Court might substitute another administrator in their place upon their failure to carry out the administration. But, in my opinion, the fact of the first administrator being a creditor ought not really to make any difference in regard to revocation. After all, the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient. If the Court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and if it turns out that the person so appointed will not or cannot administer, I do not see why the Court should not revoke an inoperative grant and make a fresh grant.

Therefore I accede to the present application. I revoke the grant formerly made to the widow of the intestate, and I direct a fresh grant to issue in favour of James Loveday in respect of the personal estate and effects of the intestate left unadministered.

Solicitor: *S. Gissing Skelton.*

H. D. G.

PRYOR *v.* PRYOR, COWIE AND MACDONALD.

1900
Jan. 30, 31; *Feb.* 1, 2, 5, 12.

Divorce—Adultery of the Wife—Cruelty of the Husband—Discretional Bar—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree.*

The discretion conferred upon judges of the Divorce Court by s. 31 of the Matrimonial Causes Act, 1857, is not an absolute or arbitrary, but a judicial discretion, and is intended to be exercised in conformity with the former practice of the House of Lords. Cruelty on the part of a petitioner, in order to bar a claim for a divorce, must either have led to the adultery of the respondent, or be entirely wanton and unprovoked in its character.

In considering what terms should be imposed upon a petitioner who has been found guilty of cruelty towards the respondent, the Court takes into consideration all the facts of the particular case before it, and considers the interests not merely of the parties, but of the child or children (if any) of the marriage.

Where the means of the petitioner (husband) were very small and uncertain, and the respondent's parents, whose character and goodwill were unquestioned, had offered to look after the only child of the marriage, the Court, in granting a decree, assented to an arrangement which had been arrived at between the parties subsequently to the verdict, whereby the formal custody of the child was given to the respondent and no allowance was ordered against the petitioner.

THIS was a petition by the husband, praying for the dissolution of his marriage on the ground of his wife's adultery with the two co-respondents, against whom damages were claimed.

The respondent denied the alleged adultery and counter-charged desertion and cruelty.

The co-respondent Cowie appeared and denied the adultery alleged against him.

The other co-respondent did not appear.

After a trial lasting several days, the jury found that the respondent had committed adultery with Macdonald, but not with Cowie, and they assessed the damages against Macdonald at 25*l.*

The jury also found that the counter-charge of cruelty was established.

Inderwick, Q.C., and *F. Gover*, for the petitioner.

Priestley, for the respondent.

Willock, for the co-respondent Cowie.

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After arguments upon the verdict, the Court took time to consider its decision.

Cur. adv. vult.

JEUNE P. In this case the jury found that the respondent had committed adultery with Macdonald, but not with the other co-respondent. They also found that the petitioner had been guilty of cruelty towards the respondent. These findings raise the question whether I ought to exercise the discretion conferred upon the Court by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31; whether I ought to grant a divorce in spite of the cruelty of which the petitioner has been found guilty.

The exercise of the discretion conferred by s. 31 of the Act always requires very careful consideration. If, on the one hand, the Court should decide to refuse a decree, it incurs the great responsibility of leaving the parties in a deplorable condition: the husband is tied to a woman who has been found guilty of adultery and with whom he cannot be expected to live; the wife is in a similar or rather worse position. She cannot compel her husband to maintain her, or pledge her husband's credit for necessaries; neither can she appeal to this Court for restitution of conjugal rights with the object of obtaining support from him; nor can she avail herself of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). That is a state of things for which the Court should hesitate to take the responsibility, and which it should, if possible, avoid.

But, at the same time, the discretion conferred upon the Court is not an absolute or arbitrary, but a judicial discretion, and the principle upon which the discretion is to be exercised turns upon the consideration whether the cruelty of the petitioner has in any sense caused the adultery of the respondent. I do not wish to be understood as absolutely limiting it to that, because I can imagine cases where the cruelty may be so wanton and unprovoked, that, even if it has not brought about the respondent's adultery, the Court ought to withhold a decree. I wish to reserve such cases as that, though I am of

opinion that the cruelty in the present instance does not come within that class or definition.

The principle that what the Court has to look to is whether the cruelty of the petitioner has in any way conduced to the adultery of the respondent seems to have been recognised in *Pearman* v. *Pearman and Burgess* (1), and in the more recent case of *Edwards* v. *Edwards and Francis*. (2) If the history of the 31st section is inquired into, I think it will be found that the Legislature, in passing it, intended to carry on the previous course of decisions of the House of Lords in granting divorces; and, if that be so, authority could certainly be found in the later decisions of the House of Lords for the proposition that it was only in cases of cruelty which conduced to the wife's adultery, that cruelty on the part of a husband was to be held a bar to his obtaining relief on the ground of the wife's adultery.

In the present case, I am not sure that the cruelty was the cause of the respondent leaving her husband's house; but, at any rate, I am satisfied that it did not conduce to her adultery. If it was the cause of her leaving, the chain of causation at any rate stops there; because she seems to have left home, not with any intention of remaining away permanently, but upon an arrangement to resume cohabitation with her husband if his pecuniary circumstances should thereafter allow. The contemplated resumption of cohabitation was once at least within measurable distance of being arranged. The respondent, moreover, did not depart from her husband's house to go out alone into the world. Very happily for her, her parents, who acted most kindly and wisely, gave her shelter; and she was not, therefore, driven to the acts of adultery, which she subsequently committed, from being cast out upon the world.

Coming to the conclusion, as I do, that the petitioner's cruelty did not conduce to the respondent's adultery, I am of opinion that a divorce ought to be granted in this case. Then comes the question: Ought this to be done upon terms?

In the case of *Edwards* v. *Edwards and Francis* (2) the

(1) (1860) 1 Sw. & Tr. 601.

(2) [1894] P. 33.

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Court (Gorell Barnes J.) came to the conclusion that the petitioner ought to be ordered to make the respondent an allowance; and in the present instance I might well have thought it necessary to impose such a condition, but for an important consideration (apart from the very slender and uncertain means of the petitioner) which has been brought to my notice.

There is a child of this unfortunate marriage, for whose future I must do my best to ensure a provision. But for a proposal which, subsequently to the verdict, was made by one of the parties and assented to by the other, a difficult question would have arisen as to what would be the right order to make in reference to the child. In the ordinary and natural course of things, the petitioner would have liked to have the custody of the child; while the respondent would be anxious as to the child's future, and desirous if possible—though not as of right—to have a voice in determining that future.

In this case, fortunately, a solution of the difficulty has been arrived at. The father and mother of the respondent have again acted most kindly, as they have done throughout the troubles between the petitioner and respondent. They have now offered to look after the child in the future, as they have, I understand, been doing in the past. With the consent of the petitioner, the formal custody of the child will therefore be given to the respondent, on the distinct condition that the respondent's parents will look after the child. Upon this basis, the respondent is willing to waive any claim for an allowance, being of opinion that to press for it as a condition of the decree would only aggravate the difficulties, looking to the smallness of the petitioner's means, and would throw obstacles in the way of the child's welfare.

Under all the circumstances, I feel justified in making an order for the custody of the child in the terms I have mentioned, and in abstaining from imposing upon the petitioner any other terms as the price of his decree. The respondent will have her full costs in respect of the charge of adultery with the other co-respondent, which failed, and also in regard to her counter-charge of cruelty, upon which she succeeded;

but, as a matter of principle, I will not give her full costs in respect of the charge of adultery found against her: upon that she will have the "usual order" only.

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Solicitors for petitioner: *H. Gover & Sons.*
Solicitors for respondent: *Gush, Phillips, Walters & Williams.*
Solicitors for first-named co-respondent: *A. E. Baker.*

H. D. G.

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March 19, 28

Admiralty—Limitation Suit—Claim against Fund—Loss of Life—Loss of Luggage—Free Pass by Railway and Steamer—Conditions of Non-liability—Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

A free pass, obtained by an official of another railway company, for himself and wife, from the London and South Western Railway Company, for the journey from London to Jersey, referred, on the face of it, to the following condition printed on the back: "That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

Through the negligence of the servants of the railway company, and during the transit from Southampton to the Channel Islands, the steamer stranded, and the official was drowned. His own, and his wife's, luggage were also lost.

The widow on behalf of herself and infant children claimed, against the fund paid by the railway company into court in a limitation suit, for the loss of her husband and father of the children. The registrar disallowed the claim. On appeal:—

Held, by Gorell Barnes J., affirming the decision of the registrar, that, in respect of the loss of life, as the widow and children could only claim under Lord Campbell's Act, where, if death had not ensued, the party injured would have been entitled to maintain an action for damages, the conditions on which the free pass was granted, and which the deceased must, from his official position, be taken to have known, included the sea passage as well as the land transit and barred the claim:

Held, also, that in respect of the claim by the widow, as administratrix of her husband, for the loss of his personal effects, and in her own right, for the loss of her luggage, the condition attaching to the pass equally precluded any claim, for the London and South Western Railway special Act of 1848—under ss. 47, 48, 49 of which (made perpetual by an Act of 1860) the company is empowered to maintain steamers—is not controlled by s. 31 of the subsequent Railway Clauses Act, 1863, extending to

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steamers the provisions of s. 7 of the Railway and Canal Traffic Act, 1854.

The words "or other things whatsoever on board the ship" in s. 503, sub-s. 1 (*b*), of the Merchant Shipping Act, 1894, include passengers' luggage.

MOTION in objection to the disallowance by the registrar of a claim against a fund in court in a limitation suit.

The question turned on the effect of the conditions on a free pass in relieving a railway company, owning steamers, from liability for negligence involving loss of life and property at sea.

The facts were shortly as follows:—

On March 30, 1899, the twin-screw steamship *Stella*, owned by the London and South Western Railway Company, left Southampton with 174 passengers for the Channel Islands, but stranded on the Black Rock near the Casquets, and eighty-six of her passengers were drowned.

On June 6 the owners of the *Stella*, as plaintiffs, issued a writ in an action for limitation of liability, and, by their statement of claim, admitted that the stranding was occasioned by the improper navigation of their vessel, but without their actual fault or privity, and, under ss. 503, 504 of the Merchant Shipping Act, 1894, claimed a declaration that they were not answerable in damages in respect of loss of life or personal injury occasioned by the stranding either alone or together with loss of or damage to goods, merchandise, or other things to an aggregate amount exceeding 15*l.* per ton for each ton of the gross tonnage of the *Stella*.

On July 24 the plaintiffs obtained a decree limiting their liability (1) on payment into court of the sum of 15,404*l.* 8*s.*

(1) At the hearing before Bucknill J. it was contended on behalf of the defendants that the plaintiffs, the London and South Western Railway Company, were not entitled to limit their liability in respect of the loss of passengers' luggage on the ground that such personal effects were not included in the words "or other things whatsoever on board the ship" in s. 503, sub-s. (1) (*b*), of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), as these words must be limited to things of the same nature as those comprised in the preceding words "goods and merchandise," and reference was made to *Reg.* v. *Judge of City of London Court*, (1883) 12 Q. B. D. 115; but the learned judge overruled the objection, holding that "other things" included the personal effects of the passengers on board the ship.

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with interest at 4 per cent. per annum from the date of the stranding until payment, and all persons having any claims in respect of loss of life, personal injury, or damage caused by the stranding were directed to enter their claims by a fixed date.

Amongst the claimants against the fund paid into court under this decree was Matilda Beatrice Le Mare, widow, claiming, on behalf of herself and four infant children, damages, under the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), for the loss of her husband, and, as his personal representative, for the loss of his luggage, and also claiming, in her own right, for lost personal effects.

Joshua Le Mare, the husband of Mrs. Le Mare, and father of the four infant children, was, at the time of his death, in the service of the London and North Western Railway Company as chief officer and secretary of the Stores Department. In his official capacity he held a pass over the whole of the London and North Western Railway system, and was able to obtain passes from other companies. He was travelling with his wife from London to Guernsey with a free pass, issued by the plaintiff company, having on the face of it the words "For conditions see back," and on the back the following: "This free pass is granted on the following conditions . . . . 2. That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

The luggage of Mr. and Mrs. Le Mare was placed in the luggage van at Waterloo for delivery at the end of the journey, but they took a portion with them in the railway carriage, and, on going on board the steamer at Southampton, Mrs. Le Mare handed her travelling bag, containing money and jewellery, to the stewardess for safe custody. When the vessel stranded Mr. Le Mare saw his wife into a boat, but himself remained on board and went down with the vessel, the body being subsequently recovered by French fishermen and buried at Dieppe.

Having regard to the language of the second condition on the back of the free pass, the learned registrar rejected the

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claim, under Lord Campbell's Act, of Mrs. Le Mare and her children, who appealed, and by consent the question of Mrs. Le Mare's right to claim in respect of the loss of her husband's and her own luggage was also argued.

1900. March 19. *H. Tindal Atkinson*, for Mrs. Le Mare and her children. The registrar should be directed to entertain this claim, and assess the damages, for, with regard to the life claim, the conditions on the back of the pass do not exempt the plaintiff company from the consequences of the wrongful navigation of their vessel. It appears from the affidavit of Mrs. Le Mare filed in support of the claim that neither she nor her husband were aware of the conditions printed on the back; but, even assuming them to be part of a contract, they will be construed strictly against the railway company, who were bound to carry the deceased safely, and, if the conditions apply at all, they can only apply to the land transit, there being no reference to the sea journey.

Secondly, with regard to the claim for the loss of the luggage of both Mr. and Mrs. Le Mare, the railway company incurred the responsibilities of common carriers, and the application of the conditions on the back of the pass, even if held to be reasonable, was prevented by s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), extended by s. 31 of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), to the traffic carried by steamers belonging to railway companies. The effect of these sections is that a railway company is liable for loss by negligence of goods or things (including passengers' luggage: *Cohen* v. *South Eastern Ry. Co.* (1)), notwithstanding any condition limiting their liability in the absence of a special contract signed by the person delivering the goods: see *Cutler* v. *North London Ry. Co.* (2); *Henderson* v. *Stevenson.* (3)

Again, by s. 14 of the Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), railway companies can only limit their liability in respect of sea traffic by complying with formalities not present in this case, as by conspicuously posting the con-

(1) (1876) 1 Ex. D. 217. (2) (1887) 19 Q. B. D. 64.
(3) (1875) L. R. 2 H. L., Sc. 470.

ditions in the booking-office where the through booking is effected.

The bag containing jewellery was given over to the charge of the stewardess on going on board the steamer, but it makes no difference in the liability of the railway company that a portion of the luggage was in the actual custody of Mrs. Le Mare during the land part of the transit: *Great Western Ry. Co.* v. *Bunch.* (1)

Acland, for the plaintiffs, the London and South Western Railway Company. The railway company having paid the amount of their statutory liability into court, have no interest in contesting this claim, as, even if successful, the damages when assessed would come out of the fund.

[GORELL BARNES J. The plaintiffs are liable for the costs of the limitation suit, and therefore have an interest as, if they were not represented and did not contest the claim, the costs would be increased by the intervention of other claimants disputing the right of the present claimants to participate in the fund.]

There was no contract to carry the deceased. The pass was a mere licence enabling him to travel with his wife at their own risk by the company's train and boat. The deceased, as an official of another railway company, accustomed to the use of passes, must be taken to have been fully conversant with their nature, and that they conferred no rights, but only prevented the person using them from being a trespasser. The conditions were therefore binding, and bar the claim under Lord Campbell's Act.

Secondly, in respect of the lost luggage, there was no contract to convey it, and the conditions equally apply to bar the claim. The extension to steamers of the Railway and Canal Traffic Act, 1854, by s. 16 of the Regulation of Railways Act, 1868, was repealed by s. 59 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), and s. 31 of the Railway Clauses Act, 1863, is limited to the special Acts of railway companies passed subsequent to that date; but the special Acts of the London and South Western Railway Company are

(1) (1888) 13 App. Cas. 31.

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dated 1848 and 1860. They are, therefore, unaffected by these provisions, and there is nothing to prevent the conditions on the back of the pass having a binding effect.

Again, s. 14 of the Railways Regulation Act, 1868, does not affect the present case, as it applies to contracts based on payments for through booking, and all the authorities referred to by counsel for the claimants proceed on the assumption of a contractual relationship existing between the railway company and the passenger arising in the ordinary course of their business as carriers, and not to the case of persons proceeding free of charge by the trains and steamers through the courtesy of the railway company.

H. Tindal Atkinson, in reply. The liability of the railway company rests on the breach of duty to carry safely. It is not necessary to establish a contract based on payment: *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1)

[The following cases were referred to: *Watkins* v. *Rymill* (2); *Zunz* v. *South Eastern Ry. Co.* (3); *Harris* v. *Great Western Ry. Co.* (4); *Great Northern Ry. Co.* v. *Shepherd* (5); *Gallin* v. *London and North Western Ry. Co.* (6); *Bergheim* v. *Great Eastern Ry. Co.* (7)]

Cur. adv. vult.

March 28. GORELL BARNES J. [After stating the nature of the case, the learned judge continued:—] Two grounds are put forward in support of the claim, so far as it is made by the widow and children. The first is that the plaintiffs, the railway company, limiting their liability, are responsible for negligence—the loss having occurred through negligence—because the ticket or pass with which the deceased was travelling was not binding, so far as the conditions exempting the plaintiff company from negligence were concerned; and, secondly, that, even if they were binding, they were not binding or applicable so far as related to the sea transit.

(1) (1851) 11 C. B. 655.
(2) (1883) 10 Q. B. D. 178.
(3) (1869) L. R. 4 Q. B. 539.
(4) (1876) 1 Q. B. D. 515.
(5) (1852) 8 Ex. 30.
(6) (1875) L. R. 10 Q. B. 212.
(7) (1878) 3 C. P. D. 221.

It is conceded that the widow and children can only claim for loss, under Lord Campbell's Act, where the passenger himself, if alive, could claim for injury done to himself, and the question, therefore, turns on the conditions on which the deceased was carried.

With regard to the first point mentioned above, it appears that Mr. Le Mare was travelling with a free pass. The document which was given to him is headed "Free pass," and the terms on which it was granted appear on the back of it. It was granted for the journey from London to Jersey, and at the foot of it there is, in print, the words, "For conditions see back." On the back the conditions are set out. They are as follows: "This free pass is granted on the following conditions," and the second of those conditions is that, "It shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

Now, Mr. Le Mare was chief officer and secretary of the Stores Department of the London and North Western Railway Company, and according to the affidavit of the claimant he had obtained a free pass from the London and South Western Railway Company, similar accommodation being given by the London and North Western Railway Company to the employees of other railway companies. That is how he and his wife came to have free passes on the journey which they had undertaken.

The argument on the first point for the claimants was that the conditions did not really form part of any agreement entered into between the company and the traveller. On the other hand, it was said that this was a mere licence to the passenger to travel on the conditions which are set out on the back of the pass. I do not think it makes much difference whether the pass is termed a licence, or whether it indicates a contract to carry upon the conditions mentioned, because, in my view, if the conditions which are on the back are terms agreed to by the passenger, then those terms, if applicable, exclude such a loss as that which happened in this case.

It seems to me that it was a free pass granted on certain

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conditions. A number of cases were cited connected with this class of subject, but all those cases were fully considered in the judgment in *Watkins* v. *Rymill* (1), and it is quite clear to me that—as this pass bears upon the face of it a stipulation that it is issued upon certain conditions which are to be found on the back of it, and as it was given to a person well acquainted with such matters as free passes over railways—the terms upon which Mr. Le Mare was carried were the terms which are found on the free pass, and set out on the back. The conclusion of fact to which I have therefore come, with regard to the first point, is that Mr. Le Mare was carried upon the terms mentioned on the free pass.

The second point is that those terms are only applicable to land transit, and do not apply to the loss which happened during the sea transit. The point made was that all the conditions are conditions applying only to transit on railways. I cannot, however, adopt that view, because it seems to me that, although it is possible to read some of those conditions in that way, yet the second condition, which is quite general in its terms, is applicable to the whole of the transit from London to Jersey, which was the transit mentioned on the face of the ticket. It therefore appears to me that these terms apply all through, so far as they can apply, and the second condition is clearly one which exonerates the company from liability for the accident in this case. That would be sufficient to dispose of the appeal, which was only against the decision dealing with the claim by the widow and children.

A further point has however been taken by counsel on behalf of the widow, Mrs. Le Mare, namely, that she, as the administratrix of her husband, and also in her own right, has a claim for loss of luggage belonging to her husband and herself. It appears to me that—for the reasons which I have already given in relation to the claim under Lord Campbell's Act—the ticket or pass is equally binding so far as it relates to any claim for loss of, or injury to, the luggage which either of them had under the charge of the company, unless there is some statute preventing the application of these conditions to the contract

(1) 10 Q. B. D. 178.

to carry the luggage. I understand that there was luggage sent off, in the ordinary mode of transit, with the passengers, and that there was a bag containing jewellery which, on going on board, Mrs. Le Mare placed in the charge of the stewardess. I do not think that there is any difference between the claim in respect of the luggage delivered in the ordinary way at starting, and that relating to the bag, because both were, I think, in the custody of the company for carriage.

The point made with regard to the luggage is that the contract was controlled by the provisions of either the Railway and Canal Traffic Act, 1854, or the Regulation of Railways Act, 1868; but I have been supplied by counsel for the plaintiff company with the Acts relating to the London and South Western Railway which bear upon this case and which enable me to decide this point.

First of all it is said on behalf of the claimant that s. 7 of the Railway and Canal Traffic Act, 1854, controlled the contract. If that section applies liability would, no doubt, rest upon the company in this case; but that Act only applies to land carriage. It is, however, said that the Act was extended to steamers belonging to railway companies by s. 31 of the Railway Clauses Act, 1863; but that Act, belonging to the class known as a Clauses Act, applies to railways whose special Acts are passed after that time: see s. 30; and the London and South Western Acts were before that date. The first is an Act of 1848 (11 & 12 Vict. c. cxxv.). By s. 47 of that Act the company acquired the power, for a limited period, of working steamers. By s. 48 the charges to be made for travelling by those steamers were defined, and s. 49 provided for equality of treatment of the passengers on board such steamers. The second Act, that of 1860 (23 & 24 Vict. c. clxxxv.), made the provisions of ss. 47, 48, and 49 of the Act of 1848 perpetual. Both those Acts were passed before the Act of 1863. It follows, therefore, that they do not, and could not, incorporate the provisions of the fourth part of the Clauses Act of 1863, and though, by s. 16 of the Regulation of Railways Act, 1868, the Act of 1854 is extended to the steamers of all railways, s. 59 of the Act of 1888 repealed that part of s. 16 of the Act

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of 1868 which extended the provisions of the Act of 1854 to the steamers of railways.

It seems, therefore, to me that the Act of 1854, so far as the London and South Western Railway Company is concerned, does not apply. That, however, does not quite exhaust the case, because it is contended that s. 14 of the Regulation of Railways Act, 1868, is applicable to this contract, and prevents the company from taking advantage of the exonerating clause of the free pass. That section deals with the case of a company agreeing, by through-booking contracts, to carry any animals, luggage, &c., partly by railway and partly by sea, and provides that a condition exempting the company from liability for loss and damage shall not have effect unless published in a conspicuous manner in the company's office, and printed in a legible manner on their documents. I am of opinion, however, that that section does not apply to such a case as the present. I think it is intended to apply to through-booking contracts in the ordinary course of business where a payment is made, and I cannot find anything in it preventing a railway company from making such conditions as are to be found in the present case.

For these reasons it appears to me that the claims put forward must be excluded from the fund which has to be distributed, and the appeal dismissed with costs.

Solicitors for claimants, Mrs. Le Mare and her children: *Willson & Norman.*

Solicitors for plaintiffs, the London and South Western Railway Company: *Bircham & Co.*

T. L. M.

THE CRIMDON.

1900
May 17, 21.

Admiralty — Salvage — Practice — Solicitors' Undertaking — Arrest — "Good and Sufficient Reason"—Damages—Rules of the Supreme Court, 1883, *Order* XXIX., *rr.* 12, 18.

The defendants' solicitors signed, without qualification, a notice, under Order XXIX., r. 12, of the Rules of the Supreme Court, 1883, by which they undertook to enter an appearance and give bail in a sum not exceeding the value of ship, cargo, and freight; but the plaintiffs—notwithstanding the caveat which on the filing of the above notice in the registry had been thereupon entered—took out, under rule 18 of the same order, a warrant for the arrest of the defendants' vessel in a salvage action :—

Held, by Gorell Barnes J., that the defendants' solicitors, by signing the undertaking without qualification, rendered themselves personally responsible, and the plaintiffs might have taken a reasonable time to make inquiry whether the undertaking was satisfactory; but as, instead of doing so, they had insisted upon the security of the ship, the plaintiffs had failed to shew "good and sufficient reason" within the meaning of rule 18 of the same order, for arresting the vessel, and must, therefore, be condemned in damages and costs.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the Hamburg steamship *Helène Woermann*; the defendants were the owners of the British steamship *Crimdon*, her cargo and freight.

The case is reported on two points only—namely, first, as to the effect of a solicitor signing a notice, under Order XXIX., rr. 11, 12, of the Rules of the Supreme Court (1), undertaking to enter an appearance and give bail; and, secondly, as to the

(1) Rules of the Supreme Court, 1883, Order XXIX., r. 11: "A party, desiring to prevent the arrest of any property, may cause a caveat against the issue of a warrant for the arrest thereof to be entered in the principal registry."

Rule 12: "For the purpose in the last preceding rule mentioned, the party shall cause to be filed in the registry a notice, signed by himself or his solicitor, undertaking to enter an appearance in any action that may be commenced against the said property, and to give bail in such action in a sum not exceeding an amount to be stated in the notice, or pay such sum into the registry; and a caveat against the issue of a warrant for the arrest of the property shall thereupon be entered in a book to be kept in the registry, called the 'Caveat Warrant Book.'"

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meaning of the words "good and sufficient reason" in rule 18 of the same order." (1)

The facts were shortly as follows:—

On March 23, 1900, the *Helène Woermann*, on a voyage homeward from the West Coast of Africa to Hamburg, calling at Plymouth, with a general cargo, mails, and passengers, fell in, off Cape Finisterre, with the *Crimdon*, from Muros Bay in Spain to Cardiff with a cargo of pit props, disabled by the loss of her rudder and rudder post. The *Helène Woermann* took the *Crimdon* in tow, and on the 25th brought her to a safe anchorage in Plymouth harbour.

On March 26 the plaintiffs commenced an action in rem in the Plymouth District Registry, claiming salvage for services rendered to the *Crimdon*, her cargo and freight. On the same day the London solicitors of the defendants filed, in the principal registry, the following præcipe for caveat warrant:—

"We Downing, Bolam & Co. of 44–46 Leadenhall Street in the City of London hereby undertake to enter an appearance in any action that may be commenced in the High Court of Justice against the steamship *Crindon* or *Cundon* her cargo and freight [corrected same day by letter to Admiralty marshal thus: "Caveat entered to-day to read *Crimdon* her cargo and freight"] and within three days after we shall have been served with a notice of the commencement of any such action to give bail therein in a sum not exceeding value of ship cargo and freight or to pay such sum into the Admiralty Registry. And we consent that all instruments and other documents in such action may be left for us at 44–46 Leadenhall Street in the City of London. Downing, Bolam & Co." (2)

(1) Rule 18: "Nothing in this order shall prevent a solicitor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the 'Caveat Warrant Book'; but the party, at whose instance any property in respect of which a caveat is entered shall be arrested, shall be liable to have the warrant discharged and to be condemned in costs and damages, unless he shall shew, to the satisfaction of the judge, good and sufficient reason for having so done."

(2) See Rules of the Supreme Court, 1883, Form No. 18, Part II., Appendix A.

On the same day the plaintiffs telegraphed from Hamburg to their agents at Plymouth to "arrest *Crimdon*, ask 2000*l.* bail." The agents replied the same day by letter that their solicitors had been instructed to arrest the *Crimdon*, adding: "The owners, we hear, have entered caveat against arrest."

On March 27 the *Crimdon* was arrested, although arrangements had been made to tow her away. Thereupon the defendants took out a summons before the judge in chambers, and on March 28 Gorell Barnes J. ordered "that the warrant heretofore issued in this action be discharged, and that defendants be at liberty to forthwith extract a release of the steamship *Crimdon*, her cargo and freight, upon their undertaking as given in their caveat warrant entered herein," and "that the rest of the application as to the costs of and incidental to the arrest, release, and detention of the said vessel, her cargo and freight, do stand over to the trial of the action."

On March 30 the London agents of the plaintiffs' solicitors wrote to the plaintiffs' agents at Plymouth, that they had accepted two sufficiently responsible sureties, and that the bond was being completed.

On May 17 Gorell Barnes J. awarded the plaintiffs 1000*l.* for the salvage services rendered by the *Helène Woermann* to the *Crimdon*, but directed that the question as to costs and damages for the arrest of the *Crimdon* should stand over for argument.

May 21. *Scrutton* and *Chaytor*, for the plaintiffs, the owners of the *Helène Woermann*. The procedure under the rules is different according as the ship has or has not been arrested. Where the ship has been arrested, a bail bond cannot, except by consent, be filed until twenty-four hours have elapsed after notice has been served upon the adverse solicitor, giving the names and addresses of the sureties: see Rules of the Supreme Court, 1883, Order XII., r. 20; so that no question of damages for unreasonable objections can arise until the limited time has expired; and by Order XXIX., r. 5, "the value of the property under arrest shall be agreed, or an affidavit of value filed, before the property is released"; but where the ship has not been

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arrested, and a caveat has been entered with a view to substitute, in the first instance, personal security for the procedure in rem, the practice is laid down in Order XXIX., r. 12, which makes no mention of any reasonable time to be allowed the plaintiffs to make inquiries, the only provision being that, on default in giving bail, rule 17 comes into play, by which judgment for the amount of the claim may be enforced by attachment; but, as pointed out by Williams and Bruce, Admiralty Practice, 2nd ed. p. 281, the judgment is only against the defendant on whose behalf the caveat has been entered, and as, in the present case, the caveat does not state on whose behalf the undertaking is given, the whole proceedings would be nugatory. It is also to be noticed that the caveat does not state the amount for which the undertaking is given, as required by the directions inserted as notes to Form No. 18. Under these circumstances the plaintiffs were justified in insisting on the arrest, as they were not adequately protected from the risk of the *Crimdon*—which was leaving Plymouth the next morning—getting out of the jurisdiction or being lost.

If it is to be assumed, although the rules do not say so, that the solicitor who signs the undertaking is himself responsible, then the plaintiffs, who are foreigners resident abroad, would be involved in an inquiry into the financial position of the solicitor, and must be allowed a reasonable time for so doing.

[GORELL BARNES J. It is not a question of time; the position the plaintiffs took up was that they would not accept the undertaking of the solicitor.]

It is submitted that as the claim for damages only amounts to 18*l.*, one day's demurrage, whilst the salvors had a claim which has now been assessed at 1000*l.*, they had "good and sufficient reason" within the meaning of Order XXIX., r. 18, countervailing any inconvenience or trifling loss to which the owners of the salved vessel may have been put by the arrest of their vessel. The rules do not contemplate depriving the plaintiffs of the real security of the ship until they have obtained the security of responsible sureties. Under Admiralty procedure in rem, where arrest is the foundation of the action, costs and damages will not be awarded unless the arrest was

made mala fide or with crassa negligentia: *The Evangelismos* (1); *The Kate* (2); *The Volant.* (3)

[The following cases were referred to: *The Corner* (4); *The Don Ricardo* (5); *The Anna and Bertha.* (6)]

Aspinall, Q.C., and *Noad*, for the defendants, the owners of the *Crimdon*. The plaintiffs' refusal to accept the undertaking of the defendants' solicitors was unreasonable, and the arrest of the *Crimdon* was unjustifiable. The rules not only contemplate, but provide for, the substitution of personal security for the procedure in rem, and are an enunciation of a practice which has long been in use in Admiralty, and which has been found beneficial to suitors. It lies on the plaintiffs to shew "good and sufficient reason" for insisting on the security of the ship notwithstanding the caveat, and it is submitted that they have failed to shew any ground for involving the defendants in the delay and expense consequent on the arrest.

[*The Johan Benjamin* (7) was referred to.]

GORELL BARNES J. The question is whether the plaintiffs are liable, in the circumstances, to be condemned in costs and damages, under Order XXIX., r. 18, for proceeding to arrest the *Crimdon* after a caveat warrant had been filed by the solicitors for the defendants.

The writ in the action was issued against the vessel on March 26, in the district registry of East Stonehouse, which, I believe, is the district of Plymouth. On the same day the warrant to arrest was extracted in the same registry. Before the warrant was issued, the agents of the plaintiffs and the registrar of the district inquired, in accordance with the practice, whether a caveat had been filed against the arrest of the *Crimdon*; and the principal registry communicated by telegram the fact that there had been a caveat against the arrest already entered. It appears that on the same day, the 26th, Messrs. Downing, Bolam & Co. filed the usual

(1) (1858) Swa. 378.
(2) (1864) Br. & L. 218.
(3) (1864) Br. & L. 321.
(4) (1863) Br. & L. 161.
(5) (1880) 5 P. D. 121.
(6) (1891) 7 Asp. M. L. C. 31.
(7) No. 1628, October 20, 1863, Pritch. Ad. Dig., 3rd ed. vol. i. p. 370.

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undertaking, which is termed the præcipe for caveat warrant. It was signed by Messrs. Downing, Bolam & Co. without any qualification. The plaintiffs, however, according to the correspondence, were not satisfied with the undertaking of the solicitors—although their own solicitors appear to have been—and decided that the ship should be arrested. The ship was arrested on the following day, the 27th, and she remained under arrest until the evening of the 28th. In the meantime, on the 28th, on an application made to me to direct the ship to be discharged from arrest, I ordered that the ship should be discharged, and she was accordingly released. At that time, according to my recollection, no objection was made to the solicitors who had signed the undertaking. Then the question comes to this: whether for the day's detention, from the 27th to the 28th, which has been proved to have involved the defendants in expenses amounting to about 18*l.* and costs, the plaintiffs ought to be held responsible.

Counsel for the plaintiffs raised an objection to the form of the undertaking, and argued that the solicitor does not render himself personally liable by signing such a document; but there is no substance in the objection to the form of the undertaking, which is in accordance with the rules, and my opinion is that if the solicitor himself signs an undertaking of this kind, without any qualification, he is personally responsible to see that it is carried out.

The next point taken on behalf of the plaintiffs is that it is not unreasonable to object to the substitution of a personal undertaking for the security of the ship, and that the plaintiffs were, therefore, entitled to insist upon the arrest. On this point rule 18 of Order XXIX. is material. [The learned judge read the rule already set out, and continued:—]

Now, the "good and sufficient reason," referred to in that rule, which the plaintiffs have to shew to my satisfaction, is stated by them to be that they were not bound to accept a solicitor's undertaking, and were entitled to arrest the ship. I think that that is an erroneous position to take up, having regard to the rules and practice of this Court. It seems to me that the position arrived at by these rules is analogous to that

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of bail being tendered. In the case of bail being tendered names have to be given, and the other party has twenty-four hours to consider whether he will object to the bail or not, and if he objects to the bail he can do so; but I think he objects more or less at his peril, for in the case of *The Corner* (1), after objection had been taken and found to be unfounded, the party objecting was held liable in damages. It seems to me that a similar class of considerations comes in in this case. There is an undertaking, and the object of it is to prevent a ship being arrested by providing other adequate security.

If the undertaking is given, it appears to me that the opposite party is to have a reasonable opportunity of seeing whether he ought to accept or not; and if he does not accept and shews to the satisfaction of the Court good and sufficient reason for objecting, then he will not be condemned in the costs and damages.

I think in this case if the plaintiffs had said, "We have not time to act," or "We are not satisfied on some grounds that there is adequate security," the point would have been a perfectly good one to take; but neither of those points were raised. The plaintiffs themselves—not their solicitors—said, "No, we will not have this undertaking at all; we will have the security of the ship," and they never raised any question as to requiring time to investigate. The only ground really taken now is that the plaintiffs are entitled to have the security of the ship; but the rules say, "No; if you have adequate security otherwise." That is the real principle, and I think it is right from a business point of view. The whole object of the rules, and of the practice in this Court, is to facilitate business, and if a solicitor can give an undertaking which is satisfactory, then business will proceed easily and satisfactorily. On the other hand, if no facilities of this kind are to be allowed, the rules are rendered practically nugatory, and the argument put forward on behalf of the plaintiffs is that the rules are practically useless. To my mind, however, there was reasonable time—because there was practically a day—and if the point had been taken, and inquiry made into the standing of

(1) Br. & L. 161.

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the parties, it would have been found that there was no reason for arresting the vessel.

It seems to me that no ground has been shewn for objecting to this undertaking, and, therefore, that the plaintiffs are liable for the costs and damages occasioned by the arrest. So far as the damages are concerned, I think that they ought to be fixed at 18*l.*, and the costs must be a matter for taxation.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *Downing, Bolam & Co.*

T. L. M.

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May 7.

WHITTON *v.* WHITTON.

Ireland—Marriage in Protestant Episcopalian Church—Certificate—Proof of Marriage—Evidence.

A copy of an entry in the register of marriages, duly certified by the clergyman of the church where the marriage so registered has been solemnized, is sufficient to prove a lawful marriage according to the rites and ceremonies of the Protestant Episcopalian Church of Ireland.

WIFE'S petition for dissolution of marriage on the grounds of cruelty and adultery.

The suit was undefended and the charges were proved.

By a copy of an entry in the register of marriages, certified by the curate of the Mariners' Church, Kingstown, in the county of Dublin, it appeared that on January 3, 1894, Herbert Goldsmith Whitton went through the ceremony of marriage with Jessie Georgina Hutchinson Warburton, by licence, according to the rites and ceremonies of the Church of Ireland.

THE PRESIDENT. Is that sufficient to prove a valid marriage? Must there not also be evidence that the marriage in question was a good and valid marriage according to the law of Ireland? The point is technical, and may seem rather absurd from a popular point of view; but, in matters of such importance as marriage and divorce, we must be strictly regular.

Priestley, for the petitioner. By Lord Brougham's Act (14 & 15 Vict. c. 99), ss. 10 and 14 (1), this document proves itself in this country without production of the original marriage register and without any extrinsic evidence whatever. Before the disestablishment of the Irish Church, which was effected by 32 & 33 Vict. c. 42, these marriages were governed by Lord Hardwicke's Act (2); but since January 1, 1871, when the Act of Disestablishment came into operation, the Act by which such marriages are regulated is the Matrimonial Causes (Ireland) Act, 1870 (33 & 34 Vict. c. 110), ss. 32, 33, which provides, inter alia, that a marriage between persons both of whom are Protestant Episcopalians may be solemnized "in any church or chapel in which at the time of the passing of this Act marriages may be solemnized according to the rites of the United Church of England and Ireland, and in which Divine Service according to the rites of the said Church, as hereinbefore defined, shall continue to be performed." That is the Act now in force in Ireland with regard to these marriages. The term "United

(1) 14 & 15 Vict. c. 99, s. 10, is as follows: "Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

Sect. 14: "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

(2) The Marriage Act, 1753 (26 Geo. 2, c. 33).

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Church of England and Ireland" was still used in that Act, because the Act of Disestablishment did not come into operation till January 1, 1871. The certificate is evidence under Lord Hardwicke's Act. (1) [He also referred to Hammick's Marriage Law of England, 2nd ed. (1887), p. 232, and *Wallace* v. *Wallace*. (2)]

THE PRESIDENT (SIR F. H. JEUNE). I am satisfied with the evidence. There will be a decree nisi, with costs.

H. D. G.

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April 26, 27; *May* 1, 3, 4, 9, 10, 16, 21.

SYNGE *v.* SYNGE.

Desertion—Refusal by Wife, without Cause, of Marital Intercourse—Subsequent Adultery of Husband—Wife's Desertion no Bar to Relief—Decree of Judicial Separation.

A wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, and is herself in such circumstances guilty of desertion without reasonable cause.

Desertion without reasonable excuse for two years and upwards is no bar to a petition for judicial separation on the ground of subsequent adultery.

THIS was a petition by the wife for dissolution of marriage on the ground of desertion and adultery.

The husband, in his answer, denied both these allegations, and alleged that his wife had deserted him, but he put forward no counter-claim for relief.

The jury found the issue of adultery against the husband, the questions as to desertion being, by consent, left to be determined by the Court.

Bargrave Deane, Q.C., and *Le Bas*, for the petitioner.

Durley Grazebrook, for the respondent.

The main points in the arguments are dealt with in the judgment.

Cur. adv. vult.

(1) The Marriage Act, 1753 (26 Geo. 2, c. 33). (2) (1896) 74 L. T. 253.

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May 16. THE PRESIDENT. The question, and the only question now remaining to be decided in this case, is whether the respondent deserted the petitioner without reasonable excuse. The respondent has pleaded in his answer that the petitioner deserted him without just cause, but he asks for no relief in respect of this allegation, and it is not necessary for me to deal with any question of desertion of the wife, except in so far as it is involved in the question of desertion by the husband.

The following is an outline of the material dates in the case. The parties were married on September 27, 1884. Directly after the marriage they left for India, the respondent being an officer in the army, and they remained there till 1888. In that year, she first, and he afterwards, returned to this country, and they lived together as husband and wife until November in the year 1889. In that month he returned alone to India, the wife remaining in this country. He returned from India in January, 1891, and the parties lived together here, under circumstances to be presently mentioned, from February, 1891, to July, 1891. In that month the husband left to take up an appointment in West Africa, whence he returned in August, 1892. He remained in England, not living with his wife, until January, 1894, and then went alone to India to rejoin his regiment.

He returned from India in 1896, and he lived, not with his wife, but by himself, in barracks at Shorncliffe.

In May of that year he met the woman, Miss Hooker, with whom adultery has been charged, and in October he arranged to retire from the army in the following January.

In November, 1896, he went to lodge in Miss Hooker's house, St. Olave's, Sandgate, where he remained for some time, and during his residence at that place, according to the finding of the jury, he committed adultery with Miss Hooker.

The case of the petitioner is that the desertion of her by her husband commenced on December 4, 1896, a date no doubt fixed because the respondent on that day wrote a letter to his wife from St. Olave's, in which he said: "I retire on January 4, and am now on leave pending retirement, owing to being

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unable through poverty to remain in the army at home and unable to serve in India on account of my health. Now I think you know all about me, I may add I have virtually settled here."

But although this letter does contain a definite statement of his intention to remain at Sandgate, and although reasons which I shall presently mention were urged before me for treating this as the commencement of the period of desertion, I, on consideration of the facts of this case, have come to the conclusion that the separation between the parties which constituted a desertion by one or other of them occurred in fact at a much earlier period. In order to explain my reasons for this view, it is necessary to consider the relations of the parties at several periods after their return from India in 1888. I have said that they lived together as husband and wife in 1889, and I will now add that I have no doubt that they so lived in great affection. On the point of the husband's departure for India in November, 1889, the wife wrote to him a long letter, which I need not read, but which conveys to my mind the strongest impression that at that time the wife regarded the husband with complete affection. It is quite true that the petitioner's mother, Mrs. Stuart, has said in the witness-box that her daughter was on bad terms with her husband at that time; but that statement of Mrs. Stuart is to my mind completely refuted by the wife's letter, and, indeed, it shewed to me that her evidence on the subject of the relations between her daughter and son-in-law must be received with great caution. The respondent remained in India in 1890, and towards the end of the year wished his wife to rejoin him there; and then occurred circumstances which are of vital importance in this case. The correspondence between the husband and wife, and the wife and a cousin of her husband, shews that the wife was at first willing, indeed anxious, to rejoin her husband, and took part in the arrangements which were being made to secure her a passage to India; but at that time she found or made an opportunity to try her powers as an actress on the stage, and afterwards secured an engagement, and then she gave up the intention of going to India, and so

wrote to her husband. She did not in any way consult him prior to an acceptance of an engagement on the stage, but on November 21, 1890, and December 5, 1890, she wrote the following letters, which I read, not because they are very material to the question to be decided, but because they express her own explanation of her conduct:—

"November 21, 1890.

"Dear Follett,

"I received a letter from the War Office saying they would inform me in the event of a passage being available. Since applying for a passage, I have been offered some employment that is likely to be lucrative to a certain extent. But when I know more about it for certain, I will let you know; but it may prevent my accepting a passage even if it is offered me. I don't think you can be surprised at my trying to do something for myself and Alan to augment the miserable pittance you have sent me from India. Also I hear from Arnold, through Tom, of the alarming condition of affairs as to the Irish property, out of which, when sold, there will be nothing worth mentioning.

"Cissy G. Synge."

Then, the next letter:—

"December 5, 1890.

"Dear Follett,

"In my last I told you I would let you know when everything was settled. I have been trying quietly a theatrical experiment to see if that line could be successfully worked. I was introduced to Mr. Alexander of The Avenue, and he very kindly gave me a trial; the result was that he offered me an engagement, and I accepted it. Something had to be done; the state of affairs as regards the Irish property seems perfectly hopeless. My health would never stand such a place as Mhow. Alan's present and future had to be considered. These and other considerations to which I need not allude had their weight in shaping my decision. I have acted for the best under very difficult circumstances, as I felt that the smallness of your remittances left me in a state of dependence

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and penury. Your income evidently was not enough for so many, and if I could earn anything it was, I contend, my duty to earn it. At present what I earn is small and not enough to live on, but I shall get more by-and-bye, and there can be little doubt that I shall make my way. I shall continue to act under my assumed name. I am writing to your mother to-day to tell her of my decision.

"Yours, &c.,

"Cissy G. Synge."

As soon as the husband heard of what his wife had done he determined to return, and he arrived in England at the end of January, 1891. It was stated by the respondent that he was met on arrival by his wife's father, General Stuart, who refused to tell him where she was and under what name she was acting. This refusal is denied by General Stuart, but I do not find it at all necessary to decide the painful question which of the two gentlemen is guilty of falsehood, because it is immaterial, inasmuch as the respondent was certainly soon thereafter by some means acquainted with his wife's residence, and was able to meet her.

On February 2, 1891, the petitioner wrote the following letter to the respondent:—

"February 2, 1891.

"Dear Follett,

"I was very astonished to receive your telegram, the first intimation I have had from you that you are coming home, though I had two days previously seen in the papers that you had applied for leave. Your coming in this sudden way makes me fear you have done so in order to try and persuade me not to continue on the stage. I would remind you that I took that step at great sacrifice, not for my own pleasure, but in order to do what I could for the support of myself and our child, as your remittances were less than what you originally promised, and in the autumn they ceased, so that I was unable to carry out our arrangement for our living here with my father, a cruel position which I could not consent to remain in. In addition, 12*l.* a month after paying for our maintenance

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was not sufficient for me to dress myself and our child on and other expenses. I felt, therefore, that it was necessary that I should earn something, and the stage seemed to me the only chance, and I took the step after well considering the matter, and, having made up my mind and now actually taken the step, I am quite determined to pursue my course, and that nothing will induce me in our present circumstances to retire from it.

"I want you, therefore, to promise me that you will not in any way refer to the matter or try to dissuade me, because it can do no good and will only lead to unpleasantness, anger and misery between us. Unless, therefore, you can feel you can make me this promise and adhere to it, I think it would be much better we should not meet. I received a message from your mother, who has been and is most kind to me about it, and I am very glad to say approves of the step I have taken, saying you desired your portmanteau sent to the club to await your arrival, and I have sent it there; also your hat-box.

"Yours, &c.,

"Cissy."

On February 4 the petitioner wrote another letter, which is important, I think, for one word in it—the word "nominally." It is as follows:—

"Dear Follett,

"I was going out when your letter came this morning, so could not answer it. I also got a wire from my father to say he would come and see me, so he is taking this to you to the club and save a 1*d*. Alan is better, but I didn't let him out this morning, and I don't think I shall till it is warmer. As I said yesterday, I don't think things can be arranged all in a moment, and that I think you owe me some proof that your treatment of me will be different in the future. On the whole, therefore, I think it would be best for you to go and see your mother, and when you come back the change of houses that has been hanging over us will be accomplished, and then things will have a very fair chance of settling down, and we can nominally live together in peace and quiet. If you like, I will

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meet you to-morrow morning and help you choose your clothes; if it is warm I may bring Alan. Meet us, say, outside Percy Edwards' shop at 11.30. Hope you will have a nice evening with Heneage. Ask him about the ball.

"Yours,

"Cissy."

The full meaning of the word to which I referred is made clear by a letter which the petitioner wrote as follows:—

"February 12, 1891.

"Dear Follett,

"Saw MacD. He was very nice. He said he thought this was a great opening for you and it would be a pity to chuck it away. I am sending you a paper I want you to sign before you come back. Send it back to me. I am all right again. Alan must keep his birthday Monday or Tuesday. We go home to-morrow; my love to your mother.

"Yours,

"Cissy G. Synge."

This is the paper:—

"1. You promise me most faithfully that you will not either directly or indirectly endeavour to induce me to leave the stage or interfere with my professional life in any way whatever.

"2. That when we are living together under the same roof we shall only be nominally living together as man and wife."

This was followed, two days later, by another letter from the wife, in which she wrote:—

"I feel sure that this is much the happiest plan for us to follow, and I hope thereby we shall avoid the misery and unhappiness of our former experiences. You must also promise me not to refer to any of our unhappy differences in the past, but to try and live in peace and quietness, and I on my part promise to do the same."

The husband did not apparently sign the conditions in accordance with his wife's request, but he accepted them in this sense, that from February to July he lived with his wife in the same house, but occupying a separate bedroom. He has stated,

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and I think truly, that he accepted this state of things unwillingly, but that the insistence of his wife left him no alternative.

In July, 1891, he went to West Africa.

On April 28, 1892, the petitioner wrote to the respondent, who was then at Warri, a letter of which the material part is as follows:—

"My dear Johnnie,

"With regard to your letter of March 21 requesting me to inform you of my plans, I have only to say that I can make none, since, as far as I can see at present, my time will be fully taken up by my professional duties, including a tour in England and Scotland which will probably occupy three months.

"The experiment we tried from January to July last year was hardly sufficiently successful to make me anxious to repeat it. The extreme insufficiency of the allowance you are pleased to make me renders this devotion to my profession absolutely necessary if I am ever to hope to better my position, which at the present time, were it not for the money I make myself, would be one of extreme poverty, and this is a condition in which I have no intention whatever of existing if it can be avoided by any exertions of my own. Mutual recriminations are useless, but I must remind you that since you have held your present appointment and gained a large increase to your income, you have made no proportionate increase in mine. I hope you feel all the better for your change of air. Alan has had a bad cold lately, but he is better now. He sends you his love. My mother has let the house again in Penywern Road and is thinking of taking another.

"Yours affectionately,

"Cissy."

In August, 1892, the respondent returned from West Africa, and he wrote to the petitioner the following letter:—

"24th August, 1892.

"Dear Cissy,

"Your letter has arrived. Before we go any further, will you please let me know if your letter to Warri is to be accepted

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by me as final or not. I have no intention of living the same sort of life as you imposed on me when I was last at home. You had better wire to me Yes or No. If the former, then I shall come up and see if I can make things more comfortable for you in your mad enterprise: if No, then chaos."

The answer of the petitioner, which I regard as very important, was as follows:—

"Wednesday, August 25, 1892.

"My dear Johnnie,

"Yours this evening. I did not wire, as I don't think matters can be arranged by a Yes or No, as you seem to think. Why must you make all things hinge on the one condition? I am perfectly willing to be the best of friends and companions to you, if you would only consent to do without what you know is distasteful to me. I can't see why it should not be so, and that we should get on all right if you make up your mind to do so. Why, if you love me so much as you say, you should wish me to do what you know is not congenial to me, and never was, I don't know. Why cannot we agree without that form of what is to you amusement? Surely it would be a lesser evil, looking at it from your point of view, than being altogether away from me? Now, don't be silly and act hastily and be sorry for it after. We can get on easily if you will be only sensible.

"Yours affectionately,

"Cissy."

The petitioner and respondent did not live together after these letters, and they never lived together again. The husband resumed his regimental duties at Aldershot and elsewhere, and the wife remained in London pursuing the avocation of the stage.

On March 25, 1893, the respondent wrote to the petitioner as follows:—

"Dear Cissy,

"Are you still in the same mind as you were in August last year: that you owe me no duties, can get on well enough

without me, and want nothing more to do with me? How long is Alan to be at Ealing?

"Yours,

"F. M. S."

The petitioner replied in the following letter:—

"April 2nd, 1893.

"Dear Johnnie,

"I have been too busy to answer your letter before, as I have had influenza and also had to play Miss Terry's part as she was away for eight days. I brought Alan back from Ealing yesterday; he was there three weeks, and has quite recovered from his cold after influenza and is looking very well indeed.

"Monday Morning.

"Your letter came this morning. Alan's bank-book is back, and I will send it to-morrow. He got his Easter egg; I took it down to him at Ealing. He was very pleased with it. Claude is here. He doesn't go abroad till September. My mother is home again. As to your questions, I should rather like to know what you propose to live on and keep an establishment on, and what you have to offer in return for the independence I have earned and worked hard for for myself, and which promises to increase, and rapidly so. As to duties, yours seemed to sit lightly upon you while you were abroad beyond providing a totally insufficient sum to keep us. How are the girls? My love to them. Alan sends his love. He goes back to lessons to-morrow.

"Yours affectionately,

"Cissy."

It appears that the husband, who contemplated returning to India in 1894, was anxious that his wife should accompany him as she had previously done.

We have not the letter in which he conveyed this wish, but the petitioner answered her husband's letter as follows:—

"January 3rd, 1894.

"My dear Johnnie,

"Yours last night. I was rather surprised at the contents. I'm afraid circumstances render it impossible that I should

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answer your questions as I would have done in 83–84 after all that has passed. Don't misunderstand me. I bear you no ill-will, but I think we should be better friends at a distance, and I really could not contemplate a life that would mean constant differences of opinion. I think matters had better remain as they are at present. You see, however you might wish it, you can never pick up a broken thread. I would like to know if Mr. Fowler expects a term's notice about Alan. You can say it is because the place doesn't suit him and that his doctor says it is too relaxing for him.

"Yours affectionately,

"Cissy."

Soon after the respondent returned from India, early in 1896, he wrote to the petitioner a letter which contains these words: "When you have time will you let me know whether you have made up your mind about what I asked you."

In her reply, which appears to have been written on February 15, 1896, the petitioner wrote: "I don't know why you should write post-cards and letters and ask me to say Yes or No. The matter is far too serious and I gave you my views on the subject some time ago, which I thought you understood. Leave well alone."

This ended the correspondence between the parties on the subject of their living together, and, as I have said, the respondent soon after met Miss Hooker and took lodgings in her house, St. Olave's, Sandgate, in the following November.

Consideration of these facts and letters in their sequence brings me clearly to the conclusion that it is impossible to say that any separation or desertion took place, in the sense of commencing, at the end of 1896. I regard the period of commencement of a separation between these parties as being clearly defined, and I fix it at the time of the husband's return from West Africa in August, 1892.

The parties had lived together in 1889 as husband and wife; they had again lived together, under the conditions I have mentioned, not as husband and wife, but agreeing to the state of things, in 1891; but on his return from West Africa it is clear that the respondent wished to live with his wife as her

husband, and it is equally clear she was willing to live with him, but not as his wife. The result was a separation; and from that time the separation, so begun, continued. Ever after the husband was willing to cohabit if, and only if, marital rights were allowed to him; and the wife was willing to cohabit if, and only if, such marital rights were not insisted on. I regard the letter of December 4, 1896, not as announcing anything new or as expressing on the part of the husband an intention to desert his wife, but as written in view of the state of things which had been continued for more than four years, and as merely stating where his residence then was, and was for some time likely to be. I may add that the evidence both of the petitioner and respondent given before me was perfectly clear and candid to the effect that at all times after the respondent's return from West Africa she was willing to live with her husband only if there was no intercourse: he was desirous of living with her but only on the ordinary terms of married life.

The learned counsel for the respondent, Mr. Grazebrook, sought to extract from the evidence proof not only that the wife refused to live with the husband as his wife, but that after a certain time, which he placed in April, 1892, her conduct changed, and that thereafter she became unwilling to live with him on any terms at all. He based his argument on some expressions in the letters I have read.

But although, taken by themselves, these expressions (for example, the phrase in the letter of January 3, 1894, "I think we should be better friends at a distance") may look like the expression of an absolute determination to live separate, I think that, taking all the circumstances into consideration, they do not amount to more than a reiteration of the determination to live with her husband only on her own terms.

On the other hand, Mr. Deane urged on me the view that not till the end of 1896 did the occasion arise when the desertion by the husband could be, and, as he argued, was, effected. He contended that before that time the husband was an officer in the army, and so compelled to fix his residence at Aldershot or Shorncliffe, or elsewhere out of London; and that the wife

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was an actress and compelled to live in London; and that, as this condition of things continued by consent of both parties, it was not till the end of 1896 that the respondent on retiring from the army became free to reside with his wife, and that, therefore, his letter of December 4, 1896, should be taken as a declaration of his intention not to live with her, and so constituted desertion.

But I do not think that this view is consistent with the facts.

The necessity of the husband and wife residing at different places was never suggested by either husband or wife as the obstacle to their resuming cohabitation; nor, in fact, in my opinion, did it constitute the real obstacle to the resumption, if not of complete cohabitation, at least of such residence together, constantly or occasionally, as would negative the idea of separation or desertion. In his letter of August 24, 1892, for example, the respondent clearly shews that he could and would resume ordinary marital relations if his wife was willing to do so. I think the plain and simple fact is, as the parties themselves in effect stated in evidence, that the obstacle, and the only real obstacle, in the way of cohabitation after the husband's return from West Africa in August, 1892, and its continuance, with the exception of the period of his stay in India in 1894 and 1895, was the refusal of the wife to allow the exercise of his marital rights.

I may, therefore, at this point consider a question which, in my judgment, lies at the root of this case. If a wife without cause (I will consider presently the cause alleged in this case) refuses to live with her husband as his wife, has the husband a reasonable excuse, within the meaning of s. 27 of the Act of 1857 (20 & 21 Vict. c. 85), for refusing to live with her? Mr. Deane contended that such a cause does not constitute a reasonable excuse, and he based his argument on the undoubted principle that neither this Court, nor the Ecclesiastical Courts in former days, ever enforced complete marital relations between spouses. Lord Stowell said more than a hundred years ago: "The duty of matrimonial intercourse cannot be compelled by this Court, though matrimonial cohabitation may." (1)

(1) (1790) *Forster* v. *Forster*, 1 Hagg. Cons. 144, 154.

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From that Mr. Deane sought to draw the conclusion that the matrimonial intercourse was a matter beyond and outside the cognizance of courts of law. I entirely agree with this contention so far as it alleges that the courts of this country have never sought directly to enforce matrimonial intercourse; or, to state the same thing in other words, a refusal of matrimonial intercourse has never been regarded as a matrimonial offence; and I do not think it necessary to refer to the authorities which bear out this well-recognised principle.

But I do not think that this principle carries us sufficiently far. It is clear that a reasonable excuse, within the meaning of s. 27 of the Act of 1857 (20 & 21 Vict. c. 85), need not be a matrimonial offence. If authority is needed for this, it is to be found in the case of *Russell* v. *Russell* (1) in the Court of Appeal. It is true that that case dealt with s. 5 of the Matrimonial Causes Act of 1884 (47 & 48 Vict. c. 68), and the words "desertion without reasonable cause" in that section; but the basis of the decision given by the majority of the Court was that the words "desertion without cause" in s. 16 of the Act of 1857 (20 & 21 Vict. c. 85), did not limit this cause to the commission of a matrimonial offence.

It appears to me clear that "desertion without reasonable excuse," in s. 27 of the Act of 1857 (20 & 21 Vict. c. 85), is no more limited than the words "desertion without cause" in s. 16; and this, I think, was the view taken by Gorell Barnes J. in *Oldroyd* v. *Oldroyd* (2) when he said that "cause," "reasonable cause," and "reasonable excuse," all mean the same thing.

Does, then, a refusal of marital rights by a wife constitute a reasonable excuse for desertion by a husband? The question is one dependent on considerations of a general character, and I am not aware that this Court has ever pronounced a decision on the point.

There are some dicta which appear to me to point to an affirmative answer to the question which I have just stated. In *Mackenzie* v. *Mackenzie* (3), a Scottish case, Lord Herschell

(1) [1895] P. 315. (2) [1896] P. 175, 182.
(3) [1895] A. C. 384, 389.

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said: "It appears to me that it would be essential for the party suing for a divorce to shew that he or she had during that time used every reasonable endeavour to induce the other to adhere, and been ready and willing to discharge on his or her part all marital duties."

It cannot, I think, possibly be contended that consent to the ordinary rights of a husband does not fall within the marital duties of a wife.

Again, in *Rippingall* v. *Rippingall* (1), which was a petition by a wife for restitution of conjugal rights, Lord Hannen said: "Then it was proved that Mrs. Rippingall had formerly refused to perform her conjugal duties, but that is no ground for refusing the order now asked for. I cannot speculate on her motives, but it must be presumed that she is now prepared to act in a different way." It appears to me that Lord Hannen would not have so expressed himself if he had thought that a wife, while persisting in refusing to perform her conjugal duties, was nevertheless entitled to claim cohabitation from her husband by a suit for restitution of conjugal rights. He would surely have said that the performance or non-performance of the conjugal duty in question was immaterial.

In the case of *Ousey* v. *Ousey and Atkinson* (2) Lord Hannen held that desertion by a husband was excusable when a wife was unable or unwilling to consummate the marriage, and even when the husband believed that such was the case. It is quite true that that was a case of non-consummation of a marriage, which of course rendered the marriage itself voidable; but what Lord Hannen said was (3): "I think that a husband taking the view that the fault was not with himself but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and therefore, leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute." I read these words in a large sense. I do not think it can reasonably be contended

(1) (1876) 24 W. R. 967. (2) (1874) L. R. 3 P. & M. 223.
(3) L. R. 3 P. & M. at p. 225.

that if a wife permitted to her husband one act of intercourse and no more, that the connection between them would be more tolerable and more likely to lead to happiness and not to misery than if she refused intercourse altogether.

If, however, authority for an affirmative answer to the question I have stated is thus scanty, I can find no authority in favour of an answer in the negative. The only case I have been referred to which to my mind at all bears upon the question is *Rowe* v. *Rowe*. (1) That was a case of a petition for judicial separation by a wife on the ground of the husband's cruelty and adultery, and the husband pleaded that the wife had wilfully withdrawn herself from his bed or refused to render him conjugal rights. It was held that this plea constituted no answer. But this was not a case of desertion or separation either by the husband or the wife, and even if the wife's conduct had been supposed to amount to desertion, that would have been no answer in a suit for judicial separation on the ground of cruelty and adultery: see *Duplany* v. *Duplany*. (2) If, then, there is no authority compelling me to decide that a husband in declining to live with a wife who refuses him the rights of a husband has no reasonable cause for so acting, I will not so hold. I cannot think that any husband is bound continually to expose himself to such mortification and misery as is necessarily involved in the life to which the petitioner in this case, in the letter of August 24, 1892, invited the respondent.

The objects of married life, as expressed in the Marriage Service, are not the less true because they are the utterances of a more plain-spoken age than the present; and while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it. I adopt the spirit of the words—the wise words—of my great predecessor, Lord Stowell, in the case to which I have already referred. (3) Speaking of a case in which a husband was

(1) (1865) 4 Sw. & Tr. 162. (2) [1892] P. 53.
(3) *Forster* v. *Forster*, 1 Hagg. Cons. 144, 154.

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alleged to have withdrawn himself from his wife's bed, he said: "This species of malicious desertion is a ground of divorce in some countries—certainly not so here, and still less will it justify a wife in a resort to unlawful pleasures that lawful ones are withdrawn. It is not, however, to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the very institutions of marriage, and if he has so done he ought to feel less surprise if consequences of human infirmity should ensue."

The result, therefore, is that, in my opinion, the respondent did not desert the wife, but rather she deserted him; or, if he did desert her, that he did so with reasonable excuse within the meaning of the Act of 1857.

The above view, I think, is decisive of this case. But Mr. Deane has presented to me the case of the petitioner in another aspect, which I must now examine. He in the first instance urged, or perhaps rather suggested, what was not mentioned in the petitioner's pleadings, that the wife had the reason for refusing marital rights to her husband that he was infected with the disease of syphilis, and that therefore intercourse was unsafe and improper. If this could have been proved in fact, it would have established the petitioner's case. I should have held without hesitation that for a wife to refuse marital intercourse under such circumstances constituted no ground for desertion by the husband.

But not only was this not proved, but the reverse was proved. The respondent was able to shew by his own evidence and that of Dr. Birch, a relative who had attended him and who examined him carefully before he went to West Africa, that he had never suffered from this disease, and I am glad to say that on this evidence the imputation was handsomely and completely withdrawn. I confess I hoped that, when this admission was so properly made, the petitioner would have gone further and would have withdrawn the petition, satisfied that the cause she alleged for her treatment of her husband was a complete mistake on her part, and perhaps also taking

the kindly and considerate view that much might be forgiven to a husband who, if he had erred against her, had done so under circumstances for which she was not altogether free from responsibility.

But this course was not taken, and the contention was advanced on behalf of the wife that, even if the respondent had not in fact suffered from syphilis, the petitioner at any rate had so believed bonâ fide, and that such bonâ fide belief, justifying her refusal of marital intercourse, destroyed the ground of desertion by the husband. I am not prepared to say that a wife's belief, even if bonâ fide, can have any such effect as is sought for it. If the wife can prove disease in her husband as a fact, that has the result which I have already ascribed to it. But how can her mere belief, even though held bonâ fide, if mistaken in fact, have the same effect? Possibly, if the truth cannot be ascertained, as in *Ousey* v. *Ousey and Atkinson* (1), the belief of the parties may have an effect similar to that which Lord Hannen gave to it. But when the fact can be and, as in this case, has been ascertained, why should the mistaken belief of the wife, even if honest, prevail over the well-founded and equally honest belief of the husband? The primary question to be decided is, Had the husband reasonable ground for desertion? If belief is to be taken into consideration, why should not his honest belief that his wife refused him marital rights without cause justify his conduct, even though the wife honestly believed that she had good grounds for such refusal? The solution of the problem presented by such conflict of belief is, I think, to be found in holding that where the fact can be determined, the fact must prevail, and that erroneous beliefs on either side are immaterial.

I should have been glad for several reasons to have left the case here, and to have avoided deciding the question whether in this case the wife did bonâ fide believe that the husband was infected with syphilitic disease, and on that ground refused intercourse with him. But, as this case may be the subject of an appeal, I feel bound to express the opinion which I have formed on this point also.

(1) L. R. 3 P. & M. 223.

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It would appear to be the fact that shortly before his marriage, and while his engagement to the petitioner was for a time broken off, the respondent committed a sexual offence and contracted gonorrhœa. He believed that he did, and practically he did, recover from this before marriage. The marriage between the petitioner and respondent was not consummated at once or during the voyage to India, because of the petitioner's state of health at the moment and the separation of married people on the voyage; but it was consummated soon after the arrival in India. Some little time after the respondent had an abscess on his thigh. He stated, and I believe truly, that he had had such abscesses twice or three times before, one when only fourteen, the others after long voyages.

On this occasion, at the same time as the abscess occurred, some recrudescence of the malady he had suffered from before marriage manifested itself by a discharge. He told his wife of this, and it would seem also told her the cause, and by consent they abstained from intercourse until the respondent became completely recovered.

It appears also that during his stay in India the respondent suffered from a growth on one of the bones of the pelvis in the region of the groin.

This was caused by a strain incurred in bowling while playing cricket at Winchester some years before; and, while in India some time after, a similar strain from a similar cause appears to have resulted in a similar effect on the other side. In fact, neither the abscesses nor the affections of the bone on the groin were in any way connected with venereal disease. Medical evidence was given before me that growth of bone of a similar kind, though in a different locality, and abscesses might be symptoms of syphilis.

The case put forward was that she knew, as was no doubt the case, of these maladies of her husband, that she did not till 1890 know of their character, but that then she discovered, as she said, that they indicated a disease in her husband which might be communicated by intercourse to herself or a child, and that on that ground she refused to allow intercourse by him. Now, was there any such belief bonâ fide entertained by

the wife? It is, of course, at once to be remarked that she entertained no such belief in 1889, and that in fact in that year the respondent and petitioner lived together as husband and wife with no objection on her part and no ill results.

The petitioner meets this by saying that when she went on the stage and her husband was about to return to England, at the end of 1890, she consulted a friend, Mrs. Goldschmidt (who was called as a witness), and told her of the growth of bone and the abscesses; that Mrs. Goldschmidt spoke to Dr. Grigg, an eminent doctor who is now dead, on the subject, and told the petitioner that Dr. Grigg had informed her that marital intercourse ought not to take place. The petitioner says also that she spoke to her mother about the same time on the same subject. Her mother, who was called, did not apparently give her daughter any direct advice, but she evidently, and according to her evidence, agreed with her daughter in the course she proposed to take. It is, however, very difficult to see why the petitioner, who knew the facts in 1888 as well as in 1890, did not take any steps prior to living with her husband in 1889. I must say also that the evidence of both these witnesses, Mrs. Goldschmidt and Mrs. Stuart, seems to me very extraordinary. I cannot understand how any fair-minded and sensible woman could have done what Mrs. Goldschmidt herself and the petitioner say that she did. The petitioner could only describe her husband's symptoms in a very general way, and Mrs. Goldschmidt could tell Dr. Grigg no more. I find it impossible to suppose that Dr. Grigg, an eminent and experienced practitioner, on such information, without ever examining or even seeing the respondent, committed himself to the opinion that the respondent suffered from syphilis and that intercourse between him and his wife should be permanently abandoned; and I find it most difficult to believe that Mrs. Goldschmidt, with only an opinion of Dr. Grigg so obtained in her mind, would have taken upon herself so serious a responsibility as that of advising the petitioner to refuse to live with her husband as his wife without taking any step, or suggesting that any steps should be taken, to get the real state

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of the facts ascertained. The evidence of the respondent puts a different view as to what may have taken place between the petitioner and Mrs. Goldschmidt. He says that after his return from India his wife spoke of refusing marital intercourse, not on account of his health, but for reasons connected with her employment on the stage or her feelings on the subject; and he protested against such a course as unnatural, and told her to ask any lady friend's opinion on the subject, and that she did, in consequence, consult Mrs. Goldschmidt, and told him afterwards that Mrs. Goldschmidt agreed with her. This appears to me a far more probable version of what happened than that given by the wife and Mrs. Goldschmidt.

Of Mrs. Stuart's evidence I desire to say very little. She stated to me that she believed her son-in-law was infected with disease on account of the condition of his child, though she had never spoken to any doctor on the subject; and when I asked why, before supporting her daughter in the course she had taken, she did not think it right to consult Dr. Birch or some other doctor and ascertain the facts, she said that she did not do so because it was no business of hers.

There is, however, one fact in this case which is to my mind clearly established, and which militates most strongly, indeed conclusively, against the bona fides of the belief of the petitioner. I have no doubt that she never communicated to her husband this ground of her refusal of intercourse. It is quite clear that in none of her letters did she ever do so, nor does he refer to any such ground in any of his. She said in the witness-box that she told him of this ground in conversation. This the respondent entirely denies; and of the two statements, which are in complete contradiction, I believe that of the respondent. It appears to me certain that if she had spoken to him as she says, he, confident, as of course he would be, that his wife was under a terrible error which could readily be exposed, would have at once gone to Dr. Birch or some other doctor and proved to his wife that she was wrong. It is to me incredible that, had she ever alleged this ground to her husband, no trace of such an objection should have ever found its way into her letters, still more into his.

On the contrary, in the one letter we have (that of August 24, 1892), which states her reason at the critical time of his return from West Africa, she speaks of the act as being uncongenial and distasteful, but never a word of its being unsafe or improper. There is another fact in this case still stronger. The son of the petitioner and respondent had some growth in the throat which was in fact wholly unconnected with venereal disease, as Dr. Birch proved, but about which the petitioner seems to have had doubts. She did speak to the respondent about this in 1896, and he at once communicated with an eminent doctor and conveyed to her his assurance that her suspicions were groundless. Is it not clear that, if in 1890 or 1892 the petitioner had spoken of the health of the respondent in relation to herself, the respondent would at once have acted as he did act in 1896? and how is it possible to believe that the petitioner was actuated only by a belief in her husband's suffering from a communicable disease, when we find that although it was proved to her in 1896 that she was mistaken on this point she did not then offer to retreat from the position she had taken up and receive the respondent as her husband? But it is not difficult for us to form a plausible conjecture what the real reasons, or some of them, for the petitioner's conduct were. The respondent said in the witness-box that she at different times gave him different reasons. The first of these was that she feared that her duties on the stage might be interfered with by her having children if she lived with the respondent as her husband. When we consider at what time the objection was first made by the wife, namely, in 1890 or 1891, on the eve of her going on the stage, that she had, as obviously she had, formed a strong determination that nothing should prevent her following that calling to the utmost of her power and with brilliant hopes of success, and that, in the two conditions which she sought to impose on her husband by the letter of February 12, 1891, their marital relations were coupled with her claim of freedom to pursue her career, I think it is an obvious conclusion that what the husband told us of his wife's statement of her reasons to him was true, and that the main grounds for her refusal of his rights to her husband arose, not from any belief in his state of

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health, but from her fear that interference, more or less complete, might be caused to the career which she had marked out for herself. I am, therefore, compelled to say that I cannot think it proved that the petitioner bonâ fide believed that her husband's health rendered intercourse dangerous and therefore refused him. If she ever raised the question at all in 1890 or 1891, of which I am doubtful, I think she did so to support a foregone determination of her own—a determination definitely arrived at on other grounds.

I have little more that is needful to say. I have not dealt with the petitioner's going on the stage, or the condition she laid down in her letter of February 12, 1891, as to her husband abstaining from interference with her professional life as any cause of separation between husband and wife, because I do not think that this matter was any direct cause of that separation. If, indeed, the husband had refused to live with his wife, because she made it a condition that he should, as she asked, not "interfere with her professional life in any way whatever," I think the husband would have been within his rights in refusing any such condition. It may have been right and desirable—I do not say it was not—that the petitioner should go on the stage, having regard to her great aptitude for that profession and to the pecuniary means of herself and husband, and I do not wish to discuss how far, if her husband under such circumstances objected, she may not have been justified at least in strongly endeavouring to overcome his objections; but to insist that he should never interfere in any way with her professional life is quite another thing. I do not think that any husband would be bound, nay, would be entitled, to abdicate his duties of counsel, protection, and it may be restraint, in the case of a wife entering on a life as full of dangers as it is brilliant and stimulating. But I do not think that the question of her going on the stage formed any part of the direct cause which separated this husband and wife.

Mr. Deane suggested, in the course of his argument, that if a fear of having children, with consequent interruption of her stage career, was in truth the cause of the wife's conduct, such cause constituted a justifiable reason for her conduct. He

urged that her going on the stage was dictated and rendered necessary by the pecuniary position of the husband and wife with their child. It is difficult to judge of the validity of a reason the existence of which is hypothetical and which the wife disavowed, but I am bound to say that I do not think that this could be held to be a sufficient reason for the wife's opposition to her husband's wishes as to their relations. It is not necessary to enter fully into a consideration of their pecuniary means, which are not quite clear. It may be conceded that their means were small, and that the earnings of the wife were of very great advantage to herself, her husband, and their child. But I do not think it can be said that her adopting the stage as a profession was an absolute necessity, and I cannot say that I think, under such circumstances, that the wife had the right to dictate to the husband what the marital relations between them should be.

Mr. Deane also pressed the argument upon me that, if the wife did refuse marital rights to her husband without good reason, still his duty was not to sever himself from her, but to live with her, and endeavour by kindness in course of time to obtain from her the fullest proofs of affection on her part towards himself. In many, perhaps most, cases one might say that this was a just and right-minded observation. But in this case it is to be remembered, first, that the experiment of living nominally as husband and wife was tried by these parties for some months in 1891 with results satisfactory to neither; and, secondly, that if a main cause of the wife's refusal was (as the husband no doubt believed) devotion to her art, lapse of time could not be looked to to produce any beneficial effect: indeed, increasing success on the stage would naturally increase the objection to any course which could be supposed likely to impair such success.

As to costs, the means of the parties are about equal, or the wife's the larger. In strictness, therefore, she should pay the costs of the petition which has failed, and he the costs of the issue of adultery. But I think it will be better, and probably not materially different, that each party should bear his or her own costs.

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The petition for dissolution of marriage was dismissed; but, upon the application of counsel for the petitioner, the question of applying for a judicial separation was allowed to stand over, in order that the petitioner and her advisers might consider whether such an application should be made, or whether the petitioner would appeal against the order dismissing the petition for divorce.

The application for judicial separation was subsequently made on behalf of the petitioner, and was opposed on behalf of the respondent; whereupon judgment was delivered as follows:—

May 21. THE PRESIDENT. I think I can deal with this matter at once. Although the question is important, it is one that I had before me in giving my decision in *Duplany* v. *Duplany* (1), and considered very elaborately then. I feel very strongly that the decision in *Duplany* v. *Duplany* (1)—and a similar decision if I pronounce it now—has this curious effect, that it declares that which is a discretionary defence in a case of complete divorce not to be a defence in a case of judicial separation. But that is a state of things which I think arises from a consideration of the language of the Act of Parliament.

Now the question in this case is to my mind a very simple one. It is only this: Would the Ecclesiastical Courts, in the case of a petition by a wife for divorce a mensâ et thoro, have refused her that relief if she had been guilty of wilful separation without reasonable excuse, or—which, I suppose, is the same thing—desertion? Now I put it in that way because, although I quite agree I have not formally found the fact of the wife's desertion (I did not think it necessary to do so in the state of the pleadings and of the case as it was then), yet I think it fair to both parties to say that, if I had thought it necessary, I should have held what I think the words of my judgment indicated. I said that I thought there was a separation between the parties in 1892, and that that separation came about by the act not of the husband, but of the wife; in other

(1) [1892] P. 53.

words, that the wife was then guilty of a wilful separation, which I think technically amounts to saying she was guilty of desertion. I think it is fair to say that, because it makes it clear for the Court of Appeal if the parties desire to go there. But then it comes back to this: Would the Ecclesiastical Courts have refused to a wife a divorce a mensâ et thoro, she being found guilty of desertion?

Now, I do not think there is any authority to shew that; nor could there well be such authority, because desertion was not a matrimonial offence before the Act of 1857. It is clear that the Ecclesiastical Courts would have refused a decree to a wife who was guilty of adultery. That was decided in the case of *Drummond* v. *Drummond* (1), and, after 1857, in the case of *Otway* v. *Otway* (2), which followed *Drummond* v. *Drummond*. (1) Perhaps the Ecclesiastical Courts would have gone further, and in a case of such conduct as conduced to adultery when that was the basis of the petition for judicial separation, it is possible, I think, that the Ecclesiastical Courts might have refused a decree; though I do not desire to lay that down for certain. I say that because the case of *Boreham* v. *Boreham* (3) appears to me to indicate that that might possibly have been the law. I do not say it goes so far as to decide it, because in *Boreham* v. *Boreham* (3) cruelty was proved, and cruelty no doubt was a matrimonial offence. But stress was laid on the neglect causing the misconduct, and it appears to be so reasonable to say that if one party is guilty of conduct which causes or conduces to the misconduct of the other, that that party cannot be allowed to allege that misconduct or to obtain relief for it. It seems so reasonable that, without further mentioning the matter (it is not necessary to decide it now), I am not prepared to say that the Ecclesiastical Courts might not have refused a divorce a mensâ et thoro on the ground of misconduct, if it were shewn that that misconduct was brought about by conduct on the part of the petitioning party. Then I shall not dispute that the Ecclesiastical Courts would refuse a judicial separation

(1) (1861) 30 L. J. (P. & M.) 177. (2) (1888) 13 P. D. 141.
(3) (1866) L. R. 1 P. & M. 77.

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where collusion was proved. I think *Butler* v. *Butler* (1) is an authority for that; but without any distinct authority I should have thought that, inasmuch as collusion goes to the root of the whole of the validity of a suit in a matrimonial matter, and inasmuch the Courts have always regarded collusion as fatal, because it deprives the Court of the means of finding out the truth—I should have thought the Ecclesiastical Courts would have regarded it as a bar to a suit for divorce a mensâ et thoro, just as under the Act of 1857 the Court is bound to dismiss a petition if there is collusion.

Then comes the gist of this case. It has to be admitted that before 1857 desertion or wilfully separating by the wife would not have been an answer to a suit for divorce a mensâ et thoro. It is said that that is so, because desertion was not a matrimonial offence before 1857. Then it is said—and said with great force—that the Act of 1857 makes desertion a matrimonial offence, that is to say, affords relief in certain cases where desertion is proved.

That is quite true, and in cases of complete divorce the Act provides a correlative proposition—that when a person is guilty of desertion, that may be an answer to a suit for complete dissolution. Then it is said we have now a new matrimonial offence, and why should not the same effect be given to it now as was given to what were matrimonial offences before that Act?

That is a very reasonable argument, and that is what I had to consider in the case of *Duplany* v. *Duplany* (2), and that is why I think *Duplany* v. *Duplany* (2) governs the present case. I thought then and I think now—though, of course, it may well be that the Court of Appeal may think otherwise—that when you have an Act of Parliament making a matrimonial offence, and providing that that matrimonial offence shall have certain effects (that a decree of judicial separation can be based on it, and that a decree for dissolution of marriage can be refused on account of it)—not only making that offence, but saying what the effect of it shall be—that it is not for me to go beyond what the Act says. If the Legislature had chosen, it

(1) (1890) 63 L. T. 256.

(2) [1892] P. 53.

might have modified the effect of the section, as it did of the other sections, by saying that desertion might be an answer to a suit for judicial separation. But the Act of Parliament has not done that. It has done certain specified things, and, I cannot help thinking, has abstained from certain specified things. When you consider how carefully the Act was drawn and how elaborately it was discussed almost letter by letter in both Houses of Parliament and by what high authorities, I cannot help thinking one must hold that it means exactly what it says and nothing more; and I cannot bring myself to think that the fact that the Act of Parliament has made desertion a matrimonial offence has had the effect of making it a discretionary answer in a suit for judicial separation.

I must hold, therefore, it is no answer on the part of the husband in this case to say (though I think he might say it in fact) that the wife, before his adultery, had been guilty of desertion without just cause for two years and upwards. I do not say that the wife has been guilty of conduct conducing to his misconduct within the meaning of the 31st section of the Act, because it appears to me that though, no doubt, a wife who behaves as the petitioner in this case behaved is to a certain extent—as Lord Stowell said in the case to which I referred—morally responsible, and cannot hold herself altogether free from responsibility, still I think it is a very long step—and one I cannot take—to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband. A husband has no right to commit adultery because she refuses him. I think that would be a low and mean view to take of it. She may perhaps be morally responsible; but I do not say she has been guilty of conduct conducing to his adultery.

Therefore I put it solely on this—that she has been, as I think, guilty of desertion; but I do not think that this is a ground for refusing a judicial separation.

I will add this—that I do not think there is any real distinction between granting a prayer for judicial separation on a petition for divorce and allowing a new petition for judicial separation to be presented. I think that to require a new petition would be an unnecessary expense, and I think what Sir

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Charles Butt did in *Otway* v. *Otway* (1) was quite right. He turned the petition for dissolution into a petition for judicial separation, and I am prepared to do that now; and I think, under these circumstances, though the wife has failed in her petition for dissolution, she is entitled to have granted to her a decree of judicial separation, and I pronounce that decree. The question as to the custody of the child I will deal with in chambers should any application be thought necessary or desirable.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitors for respondent: *Berkeley-Calcott, Holloway & Blount, for H. Birch, Thame.*

H. D. G.

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Feb. 19.

IN THE GOODS OF MARY O'BRIEN.

Probate—Practice—Will and Codicils—Informalities—Infants interested—Probate granted on Motion.

Where a testatrix left three testamentary papers, two of which contained certain informalities and affected the interests of infants, the Court, being of opinion that, if the usual practice were insisted upon and the documents propounded in solemn form, the result would be to establish all three documents, granted probate thereof, on motion, to the executors.

MARY O'BRIEN, late of Delhome, Prestbury, in the county of Gloucester, widow, on December 9, 1896, made her will, which was prepared by her solicitors, Messrs. Brydges, Mellersh & Brydges, of Cheltenham, and attested by Mr. W. H. Mellersh and one of his clerks. By this will she appointed George John Marjoribanks, banker, of 59, Strand, London, and Edward H. Hanning Lee, of 7, Devonshire Place, London, to be the trustees and executors thereof, and she gave all her real and personal estate to her trustees upon trust to sell and convert into money and to invest the whole as directed, and to pay the income of this settled fund to her nephew, Colonel Edward Mashiter Dansey, until he should do, commit, or permit some

(1) (1887, 1888) 13 P. D. 12, 141.

act or default, whether voluntary or involuntary, which, if the trust for payment of the income to him were to continue, would be inconsistent with his personal enjoyment of the whole benefit of such trust, and thenceforth to apply the same income for the maintenance or otherwise for the benefit of himself, his wife and children, or any of them, as the trustees should in their discretion think fit, during the remainder of Colonel Dansey's life; with certain trusts over upon the death of Colonel Dansey in favour of his children.

By a holograph codicil, dated March 30, 1897, duly executed in the presence of a bank manager and his clerk and containing a full attestation clause, the testatrix bequeathed several specific articles of plate and furniture to certain persons, chiefly the children of Colonel Dansey, and, subject thereto, she gave all her furniture, china, plate, and glass to Colonel Dansey. She also left legacies of 100*l.* to each of her executors. This codicil was written on three sheets of paper, which read consecutively, but were found after the death not fastened together. Certain other smaller monetary bequests had been written and struck out on the third page, just above her signature, as well as two specific legacies of plate on the second page.

By another holograph codicil, which was undated but duly signed and attested and with a full attestation clause, the testatrix gave a legacy of 100*l.* to her cousin, Sibyl Margaret Dance.

The residuary legatee for life under the will had nine children, of whom six were under age at the date of the death of the testatrix.

L. D. Powles, for the executors, moved for probate of the will and codicils. Although it is usual, where infants are interested, to insist on such documents being propounded, it is to the advantage of the infants here to grant this motion. The affidavits shew that the erasures were made after execution, and the date of the third codicil is proved by affidavit If the documents were propounded in accordance with the usual practice, the result would in all probability be the same

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as the executors now ask upon motion, and the only effect would be to render the estate poorer by the amount of the costs of the action.

Le Bas, for the infants, supported the application, on the ground that it would be advantageous to their interests that it should be granted. All the property being reduced into money, in accordance with the terms of the will, they will at once obtain the legacies bequeathed to them under the first codicil. The fact that the three sheets of paper which constitute that document were not fastened together seems to be of little importance, seeing that the language at the bottom of the first sheet runs on at the top of the second sheet, and that at the bottom of the second sheet runs on at the top of the third sheet.

THE PRESIDENT (SIR F. H. JEUNE) said that the due execution of the three documents was proved, and he therefore granted probate of all three to the executors, as it seemed only reasonable, under the circumstances, that the estate should be saved the additional costs of an action the result of which would in all probability be the same.

Solicitors: *Johnsons, Long & Williamson.*

H. D. G.

[IN THE COURT OF APPEAL.]

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July 5, 6, 7, 20, 21; *Aug.* 1, 5.
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March 29, 30; *April* 30.

In re MARTIN. LOUSTALAN *v.* LOUSTALAN.

Private International Law—Will in French Form—Movable Property in England—Domicil—French Subjects—English Marriage—Husband and Wife—Change of Domicil—Intention—Revocation of Ante-nuptial Will—Matrimonial Law—Testamentary Law—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 18.

An unmarried Frenchwoman resident in England executed a holograph will in French and valid according to French law. Subsequently she set up a business in England and married there, according to English law, but without any settlement, a French refugee who had come over to escape a sentence of imprisonment passed on him by the French Court. After the marriage the business was continued by the husband and wife jointly, the husband taking in his own name leases of the business premises. About two years after the expiration of the period of prescription under the French law, the husband sold his interest in the business to his wife, assigned the leases to her, and returned to France and took up his permanent abode there. The wife remained in England and continued carrying on the business until her death:—

Held, by Rigby and Vaughan Williams L.JJ. (Lindley M.R. dissenting) that the domicil of the husband, and consequently of the wife, at the time of the marriage was English, and, therefore, that the question of validity of the ante-nuptial will was governed by English and not by French law, so that the will was revoked by the marriage.

Decision of Jeune P. reversed.

Per Lindley M.R.: Sect. 18 of the Wills Act, 1837, does not apply to the wills of foreigners domiciled abroad.

Per Vaughan Williams L.J.: The rule of English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law.

Change of domicil by evidence of intention, as affecting the status of husband and wife, discussed.

By this action Marie Loustalan claimed probate of the will of her sister, Catherine Euphrasie Martin, otherwise Guillard, a married woman, deceased, as contained in a notarial copy, the will being executed according to French law, and expressed in the French language.

In 1870 the testatrix, who was a Frenchwoman, being then in England unmarried and in the domestic service of an

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English family, made the will in question. It was a holograph will, was dated January 16, 1870, and was in one of the forms recognised as valid by the law of France, but was not attested as required by English law. Thereby the testatrix, after stating that she was residing in England, and bequeathing some small charitable legacies, bequeathed the rest of her property to her sister, the plaintiff. The will was transmitted to her sister in France, who deposited it with a notary, in accordance with French law and custom. At the date of the will the testatrix was possessed of little or no property beyond small savings from her wages; but she was, at that time, entitled to the greater part of a sum of 3000 francs, due to her from her brother, Jean Loustalan, out of the proceeds of her share of their father's estate. Whatever was due to the testatrix was subsequently remitted to her in England, where she remained until her death.

In or prior to 1874 she left domestic service, came to London, where she established a laundry business in the Edgware road, and in that year married a French refugee, Louis Guillard, but known in London by the name of "Martin," who was then about fifty-one years old. It appeared that Guillard, who had been practising in France as a professor of French, had fled to Belgium to escape prosecution for an offence alleged to have been committed by him in connection with his professorship. In his absence he was convicted and sentenced by the French Court to ten years' imprisonment, and in 1868 or 1869, subsequently to the date of his conviction, he came over from Belgium to England.

The marriage was celebrated in London by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. No marriage contract or settlement was entered into, but the husband and wife signed a declaration that they were both "domiciliés à Londres." After the marriage the husband, who had previously, since coming to England, been earning his living as a teacher of French, and had in so doing saved a little money, joined his wife in carrying on and extending the laundry business, both of them contributing towards the capital and dividing the profits in equal shares. In 1881, 1884, and 1888 leases of ground and houses in connection with

the laundry business were granted to the husband; but in 1890, the period of prescription of twenty years under French criminal law (1) having run out, he separated from his wife and returned to France, where he remained and was still living. At that time he was about sixty-seven years of age, and he stated as his reason for leaving England that he was suffering from bad health. Before leaving England he assigned the leases of the laundry to his wife, and made over to her the whole of his interest in the business and premises for a sum then paid by her to him, and she signed, at his request, a document purporting to renounce all claims she might have, as his wife, upon him or his estate at any time. The husband, however, declined to sign a renunciation in respect of any rights he might have in the laundry business or other property of his wife in case she should die before him.

In October, 1890, after his return to France, the husband executed a formal document in connection with a certain mortgage, and in that document he described himself as "Commerçant, demeurant à Londres." He had no employment or business in France, but he bought property there, and, later on, after travelling about France, he, in 1892, took up his residence with his sister, who had a house at or near the place of his domicil of origin—Vigneux, near Pau, in the arrondissement of St. Nazaire, where he was still living. His family, it appeared, had been peasants living on a farm at Vigneux.

In January, 1895, the testatrix, who had continued to carry on the laundry in London, died in a fire which occurred at the business premises, where she was residing.

Her next of kin were her sister, the plaintiff, and her brother, Jean Loustalan, and, as it was believed she had died intestate, the brother took out letters of administration in England to her estate, the husband renouncing.

Subsequently the sister propounded the will of 1870, claiming a grant of administration with the will annexed, and asking that the letters of administration granted to the brother should be revoked.

Proceedings were also taken by the plaintiff, the sister, in

(1) See Code d'instruction criminelle, art. 635.

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the French Courts, first at Pau, the district in which Sendets, the deceased's place of origin, was situated; and, afterwards, at St. Nazaire, the Court having jurisdiction over Vigneux, Guillard's domicil of origin and his alleged present domicil. Those proceedings were ex parte, and resulted in a decree being made on October 23, 1896, substantially to the effect that the sister was entitled to take possession of the property of the deceased, the Court treating the will as valid.

The brother, the defendant in the present action, opposed the will on various grounds, and asked the Court to pronounce against it and to confirm the grant of letters of administration which he had obtained. In regard to the proceedings and decrees in the French Courts, which the plaintiff set up in bar, the defendant pleaded that they were not binding upon him, inasmuch as he had no notice of them, at any rate until afterwards.

The probate action now came on for trial. The questions were: (1.) What was the domicil of the testatrix at the date of her death: (2.) Whether the marriage was celebrated according to English matrimonial law, or according to the French matrimonial régime; and (3.) Whether the will was revoked by the marriage.

G. I. F. C.

Costelloe, for the plaintiff.

Inderwick, Q.C., and *Durley Grazebrook*, for the defendant.

THE PRESIDENT, in giving judgment on the first point, found, as a fact, that, the domicil of the testatrix being that of her husband, the domicil of the husband of the testatrix at the date of her death was in France. In arriving at this conclusion, his Lordship said that they started with an undoubted domicil of origin in France, and the question was whether that was changed. In the first place, why did Guillard leave France? He left because he could not help it. Next, it was not very important that he fled first to Belgium, but from his coming to England shortly afterwards one could not draw any inference of intention to abandon his domicil of origin, though, when in England, he did several things which possessed con-

siderable weight: he married here; and he did not register his marriage in France as he would probably have done if he had intended to return to France. But he did more: he took leases of ground and houses in 1881, 1884, and 1888. He took them in connection with the business of a laundry. At the time of his marriage, both he and his wife were described as "both domiciled in London," but mere description was not strong evidence of domicil, especially in view of the fact that he dared not return to France. It was, in the next place, material to see at what time he returned to France. If he had gone back as soon as ever the period of prescription expired, that would be strong presumptive evidence that he did not intend to stay in England longer than he could help. It was, however, tolerably clear that he did not go back to France as soon as he could; and, further, when he did go back, he gave, as his reason for doing so, the bad health he was suffering from here. When he went back to France, no doubt he stayed there, but there was not much to shew that he reverted to his domicil of origin. He did not live in a house of his own, but stayed with his sister. He seemed to have bought some property—a fact to which one should attach importance; but less importance, when one found that it was not property on which he intended to live, but was bought for investment purposes. Returning to France in 1890, he travelled about till 1892, when he settled down in his sister's house, bought some property in that neighbourhood, and remained there, in fact, down to the present time. The result of the evidence seemed to be that, according to the English law of domicil, there was not sufficient to shew that he ever lost his French domicil of origin; but if there had been, there was nothing to shew that he had lost the English domicil of choice which he would have acquired, or that he intended to revert, and had reverted, to his original domicil. Therefore, as the French domicil of origin of Guillard remained, the law of France must be applied to determine the questions relating to the will in the present case.

[The Court then proceeded to hear the evidence of French experts upon the law of France in reference to the two other

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points in the case, including the French law as to the distribution of the estate of a deceased French subject dying domiciled abroad. The nature and effect of the evidence are sufficiently stated in the judgments of the President (Sir F. H. Jeune) and of the Court of Appeal. It was admitted that by the law of France marriage, when celebrated according to French law, does not revoke the prior will of either spouse.]

After hearing the arguments of counsel upon the evidence,

THE PRESIDENT (SIR F. H. JEUNE). This is a difficult and complicated case, it must be admitted, but I do not think I shall gain anything by taking further time to consider it. I have already had considerable opportunity, which I have done my best to avail myself of, to look over the evidence in the case and to consider the law, and I do not think any further examination is likely to alter the view that, on the whole, I think it right to take.

The opinion I have already indicated carries me up to a certain point.

Early in the case I decided that, in my judgment, the domicil of the husband at the time of the wife's death (which is a material point, inasmuch as the domicil of the wife is the domicil of the husband) was French, because that was his domicil of origin, and I do not think anything took place to disturb that domicil.

Then comes a further question: supposing that had been the only question, and supposing I had held that the domicil of the husband was French altogether, I think no further question would arise, at any rate as to the main points raised; but supposing it were possible to say that the domicil of the husband, although French according to English law, was English according to French law, then I think some very difficult questions would arise; and I am very far indeed from saying that I have arrived at a clear view of those questions. I have considered the evidence given, and I confess it is extremely likely (I go no further) that, in that case, we should again have

had to apply English law, though I am not insensible to the difficulty Mr. Costelloe has pointed out as to what he termed an "infinite series." Nevertheless, there is another question not exactly of the same kind as the first one, because that was a pure question of fact as to the view I take of domicil, sitting as an English judge. Imagining myself to be placed in a French court, as I was placed by the view that the domicil in this case was French according to English law—assuming myself to be placed in the position of a French judge—I had to consider what, according to the view of a French judge, would have been the domicil of the husband at the time of the wife's death. Now, the difference between the English and French views of domicil appears to me mainly to exist in the question of the animus manendi.

What domicil there is is determined, according to French law, by the Code. It is not a question to be gathered purely from the opinion of experts, because the Code Civil (art. 103) states that, in the view of the French law, the principal establishment is the place of domicil. That, I think, must be understood to mean, that a man's place of establishment is his place of domicil; and, if he has two or more establishments, then it is the principal place. But "establishment," as I understand (the evidence of one of the witnesses is very clear on this point), merely implies establishment for the time, and does not carry with it the animus manendi.

I put to one of the experts the case of a man having a house in Scotland, which he lets for a certain time, and, during the same time, takes a house in England, with the intention of going back to Scotland when the two leases run out. According to French law, he said, in his view, the domicil would be English for the time being. Now, I have already indicated my opinion that the domicil of the husband, at the time of the wife's death, was French. I say that, admitting to the full that at an earlier time, according to French law, his domicil became English. But, finding him here for a reason which compelled him to be here, namely, the fear of the French Court, and finding him carrying on a business here and living here and marrying here, I have no doubt a French judge

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would say that, during that period, his principal establishment, because his only establishment, was in England.

But the situation changes: the time of prescription runs out, and he returns to France; he goes back to his native village or district. He does not establish a house of his own as a residence; but he buys property there, has several houses there, as the tax-papers shew, and he lives, not in his own house, but with his sister, and still lives there. More than that, so far as he could, he divested himself of his English property and invested the money in France: he cut the cable. It may be true that this was ineffectual, and that when he did it it was done under the mistaken belief that his wife was not his lawful wife, and that it was a bad marriage. I think it is very likely that what he did was animated by that belief. But that does not matter, I think. He intended, it would seem, to get rid of his English property, and he invested the proceeds in France; he lived in France, and there paid taxes to which the French lawyers attached great weight, especially the personal tax. I am bound to give weight to that, because it is a matter the French lawyers attach weight to. Applying, then, all the tests which the French lawyers and writers lay down—I refer now more particularly to the view of Demolombe (Code Civil, vol. i. p. 562) expressed in his book—I think at the time of the wife's death, according to French law, that Guillard's domicil was in France. Under those circumstances a considerable part of the case is got rid of. I am not placed in the difficulty of being compelled to say that as a French judge I should ask what the law of England was, because, in the conclusion I have come to, I think the French Court would be satisfied that the domicil was French, and would apply the French law. That carries us over, and renders it unnecessary further to consider, a very considerable part of the evidence as to French law in this case. But I will add this one further observation: that I am sorry I was not able at an earlier stage to make up my mind with sufficient clearness as to the question of the French domicil according to French law, so that I might have relieved counsel from some part at least of the trouble which they have taken, and the great care they have

exercised to bring before me the French law as applicable to this case.

The only consolation I have in the matter is this: supposing this case should go further (I do not know whether it will), the Court of Appeal will have before them—if they take a different view of the fact of domicil from that which I have taken—all the materials necessary to form an opinion on that as well as on the other questions of French law which have been dealt with in the evidence of the experts.

Now comes the further question which has been raised and argued—perhaps a little at the last moment, and by the witnesses, perhaps, rather than by counsel. But it was raised during the course of the case, and, I think, perfectly fairly raised and argued. To my mind, it is all-important and goes to the root of the case. It is said that, on the facts, these people married—and it was shewn that they intended to marry—according to the matrimonial régime of England, and not according to the matrimonial régime of France. Then there is the further point that, if they married according to the matrimonial régime of England, the effect would be—failing a better word—to import into their matrimonial relations the revocation of a will previously made by the wife.

The very difficulty of stating it seems to me to shew how difficult it is to assume a correct view of the law. But there are two things to be considered. First, is it shewn that these people did marry according to the English matrimonial régime, or did they marry according to the French law of communauté, under which, in the absence of any information to the contrary, they must be considered to have married? I think that is a question which is not easy to decide for want of material. The views of the experts have differed a great deal, though, I am bound to say, on the whole, I think their view rather leads to the conclusion that the marriage was according to the English régime. M. Guastalla, it is true, was not very clear on the matter, but his view was, on the whole, I think, that the position in England would be the same as in France; that is to say, that, being French subjects, they would be presumed to have been married according to the law of communauté

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unless there was some contract (which might be verbal or written) to the contrary. Another advocate, M. Gorostarzu, went a good deal further. He thought they had adopted the English law by their intention and conduct; and he went so far as to say that, possibly (though he did not bind himself as to this), they were bound to do so. M. Mesnil, another expert, said the parties to such a marriage as this could adopt the English régime, and he thought it was a marriage under the law of England. M. Astoul (who was recalled, and was the principal advocate witness on behalf of Mr. Costelloe's views) inclined on the whole, I think, rather to the view that, on the facts, a French lawyer would hold there was an English régime; and for that he certainly is a witness who ought to be considered as of great weight.

I am not, therefore, prepared to say that, on the facts, it might not be maintained in this case that there was sufficient to shew that the parties intended to marry under the English régime, and not under the law of communauté. It is true the evidence is very scanty and not very relevant on the point, but at any rate we have this: they married in England according to English form (which is not very material, perhaps); and, when they married, they lived here and carried on a business. I do not think it is material whether the wife was carrying it on before the marriage: there is some doubt about that. My impression is that she was carrying it on before she married, and that afterwards the husband brought money into it and assisted to carry it on upon a larger scale. They certainly did carry it on directly after the marriage, and I have not any doubt that they intended to live here, for a time at any rate, and to carry on business in order to live here.

I think this is the conclusion any judge or jury would be bound to draw.

Therefore, I think, we may fairly take it that they intended to live here and carry on the business here. What inference one would draw from that I do not think it is easy to say. But I think it is a passable inference that they intended their matrimonial relations to be governed by English law. It would be very troublesome, I should think, to carry on business

in England, and yet to let the French law of community of goods, with all its consequences, influence them. I think it much more natural that, with regard to them and their property, they intended that the English law should prevail.

I do not say the inference is at all certain, and I think it is quite open to question; but, finding the advocates differ about it, and that even the leading advocate called in support of the will is by no means prepared to say that it is not so, I am of opinion, supposing it is necessary to decide the question, that they intended to marry according to English law. My doubt about it arises chiefly from an observation made by Mr. Costelloe towards the close of his reply, to the effect that French people are rather proud of carrying their French law with them, and in many cases they do consider that wherever they go the French law attaches to them and governs their property, and so on. I incline to the view that French people intend this, when abroad, the same as in their own country. Of course, that is an observation which might be made in almost any case of the kind; but I think it is an observation not without weight; and, but for it, I should be very much inclined to hold the natural view to be that if they marry in a foreign country and intend to live there and carry on business there, at any rate for a time, and make their livelihood by that business, that they intend the law of that country to regulate their property. Against that, the idea of a French person marrying according to the law of his own country is, to my mind, an inference it would take a great deal to shake.

On the whole, if I have to form a judgment, I think it should be rather that these people intended the English matrimonial law to govern their status and property; and I think it is clear that, if they can be held so to have intended, this would be sufficient.

Then comes a further question, and it is this: Is it shewn to be a matter of French law that, if two people marry under those circumstances, and marry according to the English matrimonial régime, they intended that that very peculiar provision of English law, the revocation of the wills of both parties when married, should come into operation? About

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that I confess I entertain the greatest possible doubt. The experts differ, and I daresay it is no fault of theirs, because obviously it is a very doubtful question. In point of fact I am not assisted by the experts, because I have M. Mesnil on the one side and M. Astoul on the other; and I am quite unable myself to draw any distinction between the qualifications of the one or the other to give an opinion. I should be very sorry if I were a jury to have to decide between them.

They are both gentlemen of great knowledge and experience and of great ability, and though it may be that M. Astoul has not had the same opportunity of considering the question as M. Mesnil, I think that is an observation that goes a very little way indeed, because I think a French lawyer would be able to give an opinion off-hand quite as well as he would after any amount of consideration, on a question of this kind, as to which there is obviously little or no decided authority. Therefore I am bound to take it that two advocates of equal weight, experience, and ability come to totally different conclusions.

That places an English judge, sitting to try questions of French law, in a very difficult position, and I am thrown back on a consideration of what is the sort of probability that ought to influence me. Now this is a very peculiar provision of the English law. I am bound to say I have not examined the matter, and therefore I cannot express an opinion as to what is the origin of the law on this subject. Of course, it is now embodied in the statute—that is to say, the statute recognises it (it only comes to that) as a way in which a will may be revoked. But the law is far older than the statute, and I do not know on what it rests. M. Astoul pointed out that if the meaning of the law is that the intention of the parties must be presumed, that of course would render it extremely unlikely that it was part of the matrimonial régime, or that it would be adopted as such in France. But I am unable to say what the real origin of this provision of our law is. It is a peculiar law, and I do not know that it is a very reasonable law. A very able lawyer indeed went so far as to declare that it was not, and could not possibly be, the law, because it was so absurd. But, for all that, it is the English law.

I am quite unable to argue this matter on the considerations arising as to its origin; but, doing the best I can with it, I confess I cannot bring myself to hold that it is part of the matrimonial law, which parties marrying according to the English matrimonial régime must be supposed to adopt. I threw out, in the course of the arguments, that it appears to me to be part of the testamentary, rather than of the matrimonial, law of this country. It is true it may be said it is not part of the matrimonial régime, because, previously, the wife's property went entirely to the husband, and therefore her previous will would be revoked. If the law were that the wife's will was revoked by the marriage, and not the husband's, I should think there was great force in that, and that very likely, under those circumstances, it is part of the matrimonial régime. But that is not the law: the law is, that both spouses have their wills revoked; therefore, I have great difficulty in attaching it to the matrimonial régime at all. I think it is much clearer to say it is part of the testamentary law of England, arising, it may be, from the presumed intention of the parties. It may be a provision of law, having regard to the possibility of children and the desirability of imposing on persons the necessity of making wills and thus considering the welfare of children. I do not know which reason it was; but, whatever the reason may be, it seems to me more reasonable to hold this provision to be part of the testamentary law than part of the matrimonial law of this country.

When parties marry, it appears to me they do so according to the French or according to the English régime governing their property, but that this has no reference to any provision as to what is to become of their previous wills. In other words, the régime under which persons marry deals with the property they may have, but it has no effect on the wills which they may previously be supposed to have made. Under those circumstances, I am unable to decide this very difficult question in such a way as to say that the revocation of this will, which undoubtedly would be effected according to English law, must be assumed to have taken place in this case.

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Therefore, I hold that this will is not revoked, and that it is entitled to be admitted to probate.

This is certainly a case in which the costs of both parties should be ordered to be paid out of the estate, and the higher scale may be applied in dealing with the expenses of the expert witnesses.

H. D. G.

The defendant appealed. The appeal was heard on March 29 and 30, 1900.

Inderwick, Q.C., and *Durley Grazebrook*, for the defendant. The right conclusion from the evidence is that the domicil of the parties was English at the time of the marriage, or at any rate that they were married according to English law. If they intended to be married under English law, the whole of that law applies; its application cannot, it is submitted, be restricted, as the learned President thought, to the law matrimonial: *De Nicols* v. *Curlier* (1); *Conolly's Case.* (2) Consequently, the wife's will was revoked by the marriage, according to the law settled centuries ago: *Forse* v. *Hembling's Case.* (3) The nature of the rule as to revocation of a will by marriage is illustrated by *Marston* v. *Roe.* (4) It is not a question of intention.

[LINDLEY M.R. Does s. 18 of the Wills Act apply to the will of a foreigner? I feel a difficulty about that.

VAUGHAN WILLIAMS L.J. referred to *Mette* v. *Mette.* (5)]

It is clear that the testatrix was by French law domiciled in England when she made her will and also at the time of her marriage, and it is submitted that her domicil was the same under English law: Dicey's Conflict of Laws, p. 648. The rule of law as to the revocation of a woman's will by marriage is of great antiquity: it existed long before the Wills Act.

[VAUGHAN WILLIAMS L.J. It seems to have been founded

(1) [1900] A. C. 21.
(2) (1853) Dalloz, Part I. p. 217.
(3) (1588) 2 Co. Rep. Part IV. 60 b.
(4) (1838) 8 A. & E. 14, 55.
(5) (1859) 1 Sw. & Tr. 416.

on the law matrimonial, not on the law testamentary: *Doe* v. *Staple*. (1)]

The rule depends upon the alteration of her status by marriage. The capacity of the testatrix was altered by her marriage, so that, having regard to the then state of the law as to the property of a married woman, her will became inoperative.

[They also referred to the *Roman Case* (2), the *San Francisco Case* (3), and *Forgo's Case*. (4)]

H. J. H. Mackay, for the plaintiff. There is substantially no appeal against the finding of the President that the domicil of the testatrix at the time of her death was French; and the main questions now are whether at the time of her marriage her domicil was English or French, and whether her will was revoked by her marriage. As to her domicil at the time of her marriage, the true view is that it was French. It was French when she made her will, when she married, and when she died; and the evidence of the French experts shews that under the law of France the will was not revoked by her marriage. Her capacity to make a will must be determined by the law of the country in which she was domiciled: *Bremer* v. *Freeman*. (5) That case shews that the Wills Act applies only to persons who have an English domicil. So in *Abd-ul-Messih* v. *Farra* (6), *Croker* v. *Marquis of Hertford* (7), and *In re Price, Tomlin* v. *Latter*. (8) The reason for the rule that the will of a woman was revoked by her marriage was that it was for her benefit to prevent the influence of her husband. The learned President did not decide under which régime, English or French, the marriage took place; he merely held that, even if the parties married under English law, they did not adopt the English law as to revocation of a will by marriage.

[VAUGHAN WILLIAMS L.J. Possibly they had acquired no domicil at the time of the marriage.]

If so, their domicil of origin remained. The question of domicil must be decided by the form in which the question is

(1) (1788) 2 T. R. 684, 697; 1 R. R. 595.
(2) (1865) Dalloz, Part I. p. 418.
(3) (1886) Dalloz, Part II. p. 181.
(4) (1875) Dalloz, Part I. p. 343.
(5) (1857) 10 Moo. P. C. 306, 361.
(6) (1888) 13 App. Cas. 431, 439, 441, 444.
(7) (1844) 4 Moo. P. C. 339, 357.
(8) [1900] 1 Ch. 442.

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raised. Here the domicil of the testatrix was French at the time of her death (and so the learned President held), and this domicil regulates her testamentary capacity: *In re Aganoor's Trusts* (1); *Abd-ul-Messih* v. *Farra* (2); *Mayor, &c., of Canterbury* v. *Wyburn* (3); *Lynch* v. *Paraguay Provisional Government.* (4) It is suggested that by entering the service of an English family the testatrix lost her French domicil and acquired an English one; but it is settled that a servant does not acquire the domicil of the master: *Jopp* v. *Wood.* (5) It lies on the defendant to prove that the testatrix abandoned her domicil of origin and acquired an English domicil. This he has failed to do, and therefore the domicil of origin remains: *Bell* v. *Kennedy* (6); *Udny* v. *Udny* (7); *Jopp* v. *Wood.* (8) It is clear from the evidence that she regarded herself as a French subject; and even assuming that she acquired an English domicil by entering the service of an English family, she certainly by her marriage lost it and reacquired her French domicil.

[RIGBY L.J. If the husband had not embarked in business here, he would certainly have retained his French domicil.]

Embarking in business would not be sufficient to give him a domicil of choice in England.

The will here was a good will by the law of France, and was so recognised by the French Court, whose order of October 23, 1896, was equivalent to the English grant of probate; the will must, therefore, be governed by the French law. Two French persons marrying in England are presumed to be bound by the French law of communauté des biens, unless they are domiciled in England. By the municipal law of France, if the spouses are domiciled in France at the date of their marriage in England, the marriage does not revoke a French will made by one of them before the marriage, and such a will affecting property here ought to be admitted to probate.

Inderwick, Q.C., in reply.

(1) (1895) 64 L. J. (Ch.) 521.
(2) 13 App. Cas. 431.
(3) [1895] A. C. 89.
(4) (1871) L. R. 2 P. & M. 268.
(5) (1864) 34 Beav. 88.
(6) (1868) L. R. 1 H. L., Sc. 307.
(7) (1869) L. R. 1 H. L., Sc. 441.
(8) (1865) 34 L. J. (Ch.) 212.

1900. April 30. LINDLEY M.R. The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognised in this country are part of the law of England; and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicil of the testatrix when she died. The domicil of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicil which are recognised in this country and are part of its law. Until the question of the domicil of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicil at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English Court on the view that Court takes of the domicil of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer* v. *Freeman* (1), *Doglioni* v. *Crispin* (2), and *In re Trufort.* (3) In each of the last two cases a foreign Court had determined the domicil and the English Court had also to determine it, and did determine it to be the same as that determined by the foreign Court. But, as I understand those cases, the English Court satisfied itself as to the domicil in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicil has to be decided by the Courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its Courts take of the validity of the will when made and on its

(1) 10 Moo. P. C. 306; see pp. 359 et seq.
(2) (1866) L. R. 1 H. L. 301.
(3) (1887) 36 Ch. D. 600.

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subsequent revocation if that question arises. These questions may or may not turn on the domicil of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicil may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns.

By whatever Court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicil, must be considered. If this view be ignored, the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicil of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be: 1 Jarman on Wills, c. 7; but if her domicil was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicil as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend on the English view of his domicil. It would be useless, and, indeed, entirely misleading, to ask a French expert what effect the French law would give to an English marriage, without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicil of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial. As already stated, the will was made in England by a Frenchwoman in the French language, and was a holograph will valid by the law of France whether she was then domiciled in England or France. It was made in 1870. She was in service in England,

and this by French law rendered her domicil (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was therefore here, and, according to French law, she was clearly domiciled (in the French sense) in England. In May, 1874, she married a French refugee known by the name of Martin. He came over to this country in 1868, and made a living by teaching French. There was no settlement, or anything in the nature of a settlement. The marriage was celebrated by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. At the time of the marriage both the man and the woman signed a declaration stating that they were both domiciliés in London. They lived together in London for some years and carried on the laundry. In 1881, 1884, and 1888 leases of the laundry house were granted to the husband. In 1890 the husband and wife separated; he assigned the leases to her and returned to France, where he has ever since lived and lives now. His wife remained here and continued to carry on the laundry business until her death in January, 1895. It was believed that she had died intestate, and her brother obtained letters of administration to her estate. The will, which had been sent to France in 1870 and had been deposited with a notary, was brought forward recently by the testatrix's sister, who was constituted by it her residuary legatee. At her instance the letters of administration have been revoked, and probate of the will has been granted. The will has been judicially recognised as valid in France. But as the proceedings there were ex parte, I attach little importance to this fact, although no appeal has yet been made to set aside the order so obtained.

The learned President decided, and, in my opinion, rightly decided, that the domicil of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agreed that the will was valid when made.

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They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married, they differed as to the consequences. MM. Gaustalla, Gorostarzu, and Mesnil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astoul, when first called, stated that the marriage did not revoke the will; that it depended on nationality, not domicil, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial régime by the spouses.

All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England, and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property, involves, and in a case like this cannot be severed from, English views of domicil. The learned President came to the conclusion that the domicil of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law, and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law, but part of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and the French experts should have been told so, and should have been directed that their assumption of an English domicil was

inadmissible. It is plain from their evidence that, according to French law, the domicil (in the French sense) of both husband and wife was in England and not in France, both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct; but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicil.

I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicil of origin in France. According to English law, the burden of proving that he lost that domicil and acquired an English domicil is on those who assert that he did so. Further, the domicil to be acquired must be domicil, not in the French sense, but in the English sense. The experts all tell us that he lost his French domicil in the French sense by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicil in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period: see the authorities collected in Dicey's Conflict of Laws, pp. 104 et seq. I cannot come to the conclusion that this intention is proved. I see no proof of any intention on the part of the husband to abandon France as his domicil in the English sense, and to acquire a domicil in the English sense in this country. I do not say there is no evidence tending to establish a change of domicil in the English sense, but such evidence, in my opinion, falls short of proof, and is, in fact, outweighed by evidence on the other side.

The circumstances tending to shew an abandonment of an intention to return to France are that the husband came over here and taught here; that he married a woman in business here; that he and she described themselves as then domiciliés à Londres; that he intended to settle here until he could safely return; that he lived here with his wife for some years,

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and after it was safe to return to France; that he took leases in his own name; and that (whether he knew it or not) he had lost his French domicil in the French sense.

Against this must be set the facts that he was a French subject and had a French domicil of origin; that he came here to avoid imprisonment; that he dared not go back to France for many years, but that he could safely do so at the end of twenty years from the time he fled from his own country; that he does go back a few years after it is safe to do so; and that he has ever since been and is now settled in his native country and living with his own relatives. If we look at all the facts as we now know them they, in my opinion, point to a retention of his domicil of origin (in the English sense of the word "domicil") rather than to an abandonment of such domicil and a subsequent reacquisition of it when he went back to France.

What has happened since marriage throws a greal deal of light on what was obscure at the time of marriage. But if we carry our minds back to the time of marriage and disregard all subsequent events (which I do not think we ought to do), the fact that he was then a criminal fugitive who dared not go back to France for a definite number of years, but could safely go back when they had elapsed, would prevent me from inferring an abandonment of an intention to return to France when he could safely do so: see Dicey, p. 142. I should not arrive at the same conclusion if he had fled from his country for life unless pardoned, as an English criminal fugitive would have done, to escape from the operation of the laws of his own country. The definite period after which he could safely return is, to my mind, all-important.

As to the declaration made by husband and wife when they married that they were "domiciliés à Londres," I have no doubt that "domiciliés" was used in the French sense, that is, in the sense of residence and not in the sense of what we mean by "domiciled," which has a very different signification. Upon the question of domicil (in the English sense) my own conclusions are that the domicil of the testatrix was French when she made her will; French up to the time she married; French

by her marriage; and French when she died. Her domicil was French by and after marriage because, in my opinion, her husband's domicil was French.

The domicil of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English Court would take of the domicil, in the English sense, of the husband; and if I am right in my view of his domicil, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial régime the parties intended to adopt. It is not necessary to cite authorities to shew that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicil of the husband in the English sense. The authorities will be found collected in Foote's International Law, 2nd ed. pp. 315–321, and Dicey's Conflict of Laws, pp. 648 et seq. This being clear the will was not revoked; and if not revoked it was clearly valid as regards the wife's movable property. Sect. 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's Wills Act, note to s. 18, cites an authority for this), and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not, on principle, apply to French

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spouses married in England, but (according to English views) domiciled in France when they married.

In my opinion the will has been properly admitted to probate; but it will not apply to leasehold property, for that is not regarded as movable property, to which the lex domicilii is applicable: Dicey, p. 72. A great quantity of expert evidence was taken on the difficult question whether the French law of communauté des biens was to be applied to the property of these persons. As I understand the expert evidence, the question turns not only on the marriage, but on the effect of what the husband and wife did afterwards. This question may arise hereafter, but it does not arise now, and I purposely, therefore, say nothing more about it.

RIGBY L.J. I see no sufficient reason to differ from the President's conclusion that the mutual rights of the spouses as to movables were to be determined by English law. If it is necessary, in order to support this conclusion, to hold that the husband's domicil at the date of the marriage, or at any rate the matrimonial domicil, was English, I should not hesitate to hold that it was. The husband had been brought up to be a teacher or professor of French, and at first, and down to the time of the marriage in 1874, had no other means of gaining his livelihood than by teaching French. His departure from France was brought about by his fear of a prosecution for an offence alleged to have been committed by him whilst he was a professor of French and in connection with his exercise of his professorship. Over and above the punishment to be imposed for the offence, if proved, it is obvious that conviction for such an offence would have an extremely prejudicial and not improbably a prohibitive effect on his subsequent exercise of his profession in France. As he did not elect to abide his trial in France, his evasion of a trial was almost, if not quite, equivalent to a renunciation for all his life of his profession in France. He went in the first place to Belgium, and was in his absence convicted and sentenced. The precise date of this conviction I cannot find, but it must have been before his coming to England, which was in

1868 or 1869. He might at any time have gone back to France and submitted to trial; but he did not elect so to do. It appears that twenty years after the date of his conviction he would have been safe from punishment; but he would then have been advanced in years, and if it is suggested that he formed from the first the intention of going back after the twenty years and becoming again a professor in France, such an intention would, in my opinion, be so irrational that, in default of the strongest evidence, it ought not to be imputed to him. Nor could he have had the intention of going back without having the means of supporting himself. Evidence of any such intention does not exist. I take it that the proper conclusion is, not that he had the intention of returning to France at the end of an interval however long, but that he had no intention of returning at all. He adopted the name "Martin," which might pass for an English name, and at any rate would have the effect of keeping in the background the discredited name of Guillard. He was supporting himself as a teacher of French at the time of the marriage in 1874, when a prospect opened of gaining a probably easier living by means of his wife's laundry. He married (being fifty-one years old) with the clearly-formed intention of living by the laundry business, whether or not he assisted with money or by his personal exertions in carrying it on. I consider the reasonable inference to be that he intended to remain in England and was domiciled there according to English law, as he certainly was according to French law. It is his intention that governs, not that of the wife, in the absence of any marriage settlement; and I conclude that he intended English law to apply, and that law gave him, immediately on the marriage, the exclusive right to all the wife's movables—that is to say, everything that could pass by the holograph will of 1870. As by the marriage she would become incapable of making another will, the will of 1870 would be revoked. It matters not that she might subsequently by an alteration in the law become entitled to personal property which she could dispose of by will. Such a new testamentary power would not, in my opinion, revive the will which had already been

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revoked. I have considered the question of the husband's domicil exclusively with reference to the facts as they existed previously to and at the date of the marriage.

The subsequent events do not, in my judgment, throw any light upon the question adverse to the conclusion which I have arrived at. The taking of leases for terms of years of various lengths would tend rather to shew that his connection with England was permanent than otherwise, though probably it is not of much importance. True it is that at length, not before 1890, when he was already about sixty-seven years old, he returns to France; but in the circumstances that does not give any ground for supposing that he always, from the time when he left France, had the animus revertendi. One of the reasons for returning was the state of his health; another probably the unsatisfactory state of his relations with his wife. But probably the most important thing to notice is that his residence in France was rendered possible by his having acquired a considerable fortune from his wife's property, which he had no reason to count upon before the marriage. True it is that the twenty years, the expiration of which brought immunity from punishment for the offence for which he had been condemned, had run; but it was not on the expiration of that period, but about two years later, that he returned. I am not disposed to hold this evidence of an intention throughout to return which would prevent him acquiring an English domicil. The fact that he took steps for vesting in his wife all his interest in the laundry business would be strong evidence of his intention to remain out of England; and I agree with the Master of the Rolls that in 1895 he, and therefore his wife at her death, had a French domicil.

VAUGHAN WILLIAMS L.J. I agree in the conclusion of Sir F. Jeune that the husband and wife intended to keep up an establishment in England, and that they intended to marry under English law, and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Sir F. Jeune does not accept, that at the date of the marriage the husband had an English domicil, for I find no other evidence of an agree-

ment embodying that intention, unless it be as an inference from the actual domicil at the date of the marriage. At the time of the marriage the laundry business in the Edgware Road was already a going concern. It had been established by the wife while she was yet a spinster, and it seems to me to have been arranged before the marriage that the husband should bring some money into the business, and that he did so. The husband and wife carried on this business from 1874, when they were married in London according to the prescribed requirements of the English law, until 1890, when the husband returned to France. During all this time both husband and wife had clearly, according to French law, an English domicil.

Sir F. Jeune has held that, according to English law, the wife had a French domicil, and that on the marriage she acquired the domicil of her husband, and that, his domicil of origin being admittedly French, he had done nothing to acquire any other domicil. I certainly should have drawn the conclusion myself that as far as the wife was concerned there was ample evidence of the animus manendi, and that at the date of the marriage she had, according to English law and French law, acquired an English domicil. This, of course, is not enough, because on marriage she would acquire the domicil of her husband. But even in the case of the husband I should draw the inference that he abandoned his French domicil of origin and intended to adopt a new domicil, that is, an English domicil, and thus lost his French domicil and acquired an English domicil. He was, and for some time had been, living in England. He intended to maintain in the Edgware Road the laundry business and to have his matrimonial home there. He invested money in this business, and bought land for the purpose of enlarging the business. The evidence seems to me to shew that during all this time the husband and wife did not apply the French principle of community of goods to their respective properties, but treated everything as the property of the husband. It is certain that he did not at the time of his marriage intend to return to France for at least twenty years,

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because he had been sentenced to ten years' imprisonment, and was moreover liable to a fresh prosecution for a further term of ten years. All this is evidence of an animus manendi; and although he did return to France at the end of twenty years, I see no evidence that his stay in England was intended to be thus limited; and there is considerable evidence that the occasion and cause of his return to France was quarrels with his wife. He may have contemplated the possibility of returning to France after the lapse of time should prevent a further prosecution; but I do not think that this prevents his permanent residence in England being cogent evidence of an intention to acquire a new domicil. I suppose the possibility of returning to one's domicil of origin if circumstances should change is never excluded from a man's mind, however much he may choose a country other than that of his domicil of origin as his permanent residence; but I cannot doubt that, if the husband had died within the twenty years without returning to France, his domicil would have been held under the circumstances of this case to be English; and I do not think one should refuse so to hold because he happened to return to France.

This, in my judgment, is sufficient to shew that his actual domicil at the time of the marriage was, according both to English and French law, English.

I gather, however, from the judgment of Sir F. Jeune that his view is that England became the matrimonial domicil by the agreement of the husband and wife at the time of the marriage; but I do not quite understand where he finds such an agreement unless it is to be inferred from a change of the husband's domicil. There is no express agreement, and I know of no English decision in which such an agreement has been inferred inconsistently with the fact of domicil. Husband and wife cannot by mere tacit agreement choose a matrimonial domicil.

Mr. Westlake, in Private International Law, 3rd ed. p. 68, says: "By the matrimonial domicile is to be understood that of the husband at the date of the marriage, with a possible

exception in favor of any other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it."

If this exception can be supported, for which there is no English authority, no doubt there is evidence from which one may infer that the actual English domicil after marriage was in pursuance of an ante-nuptial agreement.

I doubt, however, if domicil can be directly affected by the marriage contract. Such an agreement as to the intended matrimonial place of residence may no doubt be evidence, and cogent evidence, of adoption of a new domicil as from a date anterior to the marriage; or it may be evidence of an agreement as to the law which shall govern the movable property of the parties marrying; but I can find no case in which an inferred agreement, as distinguished from an express agreement, has been allowed to outweigh the primâ facie inference that the law of the country of the husband's domicil is to govern the movable property of the married couple.

If my conclusion is right, and if one ought to come to the conclusion—from the evidence of the husband's conduct in making his home in England for an indefinite time and going into such a business as by French law put an end to his French domicil and gave him an English domicil—that he adopted an English domicil at the time of his marriage, then at that time his wife's movables became his property; and I think that, his wife's property in the movables having thereby ceased, it follows, quite independently of the 18th section of the Wills Act, that this loss of the power of disposition put an end to her will while it was still ambulatory, and rendered it of no effect, and that nothing but republication could revive it.

If, however, the French domicil of the husband continued at and after the marriage and down to the wife's death, then it would follow that the French law, by which alone this will can be supported (for it is not in the form required by the English Wills Act), must govern the testamentary validity of this will, and also the rights of property of the husband and wife, unless there can be found some binding marriage contract determining the relative rights of the property of the husband and wife.

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Sir F. Jeune has found, as I understand, that there is such an agreement or contract. Assuming that there is, I differ from his conclusion in law on this assumption, for I think that the rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law, and that probate of this will ought not to be granted; but as I am not sure that we ought to infer that there was at the time of the marriage an agreement that the English law should govern the matrimonial property, I prefer to ground my judgment on the change of the husband's domicil at the time of marriage; and I think that, if he did change it from a French to an English domicil, then his subsequent reversion to a French domicil will not prevent English law continuing to govern the matrimonial property.

In my opinion, the effect of the husband's domicil on the matrimonial property is based on the presumption that you must read the law of the husband's domicil into the marriage contract as a term of it, unless there is an express agreement to the contrary.

I think, therefore, that the decision of the Court below ought to be reversed, and the grant of letters of administration with the will annexed revoked.

Appeal allowed.

Solicitors: *Blount, Lynch & Petre; Herbert Herbelet.*

G. I. F. C.

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May 8, 11.

Admiralty—Insurance (Marine)—Time Policy—Repairs to Ship—Particular Average Loss—Subsequent Total Loss—Assured not Liable for Cost of Repairs—Non-liability of Underwriters.

A vessel, under a charter to load home, sustained damage on the outward voyage which was repaired on arrival at the port of loading, and a payment on account of the particular average loss was made to the shipowners by the underwriters on a time policy on hull and machinery.

The repairs were paid for at the port of loading by the charterers as disbursements secured by a draft in their favour (including commission and insurance), signed by the master, pledging the ship for repayment on safe arrival at the port of discharge. This draft was insured by the charterers. The vessel was totally lost on the homeward voyage; and the underwriters on the time policy paid for a total loss, but the shipowners brought an action against them to recover the balance of the particular average loss. The underwriters counter-claimed for a return of the payment on account:—

Held, by Gorell Barnes J., first, that the shipowners could not recover as they were never personally liable for the cost of the repairs, and had sustained no loss, the amount of the draft, on the loss of the ship, having been paid to the charterers by their insurers; secondly, that the underwriters were entitled to a return of the amount paid on account, as a payment made without prejudice and under a mistake of fact.

Action to recover 24*l.* 16*s.* 9*d.*, balance of an alleged particular average loss of 76*l.* 16*s.* 9*d.* under a time policy.

The plaintiff was Charles Samuel Hunting, on behalf of himself and the other co-owners of the missing steamship *Dora Forster*. The defendants were the Union Marine Insurance Company, Limited.

The case raised the question: whether the defendant underwriters were entitled to recover back a payment made by them to the assured on account of a particular average contribution, and could also decline to pay the assured the balance, though the cost of the repair of the damage to the vessel which constituted the particular average loss had been paid for, but not—in the circumstances which had happened—by the assured.

The facts were shortly as follows:—

Under a policy of insurance, dated July 13, 1898, the *Dora Forster* was insured by the plaintiffs with the defendants in the

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sum of 800*l.*, for twelve calendar months from July 3, 1898, to July 3, 1899, the value of the vessel for the purposes of the policy being agreed at 16,000*l.*, namely, hull 11,000*l.* machinery 5000*l.*

On December 1, the plaintiffs chartered the vessel to the Georgia Export and Import Company of Savannah, to proceed to that port and there load a cargo of cotton for Liverpool or Bremerhaven. On December 10, during the voyage out in ballast, and during the continuance of the policy, the vessel, by reason of perils insured against, sustained damage to her low-pressure cylinder, but proceeded with the remaining cylinders, and, on December 22, arrived at Savannah, where, after survey, the master obtained from a firm of repairers an estimate of the necessary repairs, which were duly carried out.

On January 14, 1899, a letter from the average adjusters to the plaintiffs was produced to the underwriters suggesting a settlement on account of the particular average loss. On January 18 the repairs were completed. On January 21 the underwriters paid the plaintiffs 52*l.* on account of their proportion of the particular average loss. On January 23 the *Dora Forster*, being still under the same time policy, sailed from Savannah with her cargo. On March 29 she was posted at Lloyd's as missing, and, on April 1, the defendants paid their share (800*l.*) as for a total loss.

The charterparty contained a clause, set out in the judgment, that ordinary disbursements should be paid by the charterers to whom the vessel was consigned, and, after some negotiation, the details of which are given in the judgment, it was agreed with the master that the charterers should also pay for the repairs as disbursements. Accordingly two drafts, pledging the ship and freight, and payable three days after arrival of the vessel in England, were prepared, one, dated January 20, 1899, and signed by the master for the repairs in question, amounting to 1131*l.* 7*s.* 6*d.* (1), the other for the ordinary ship's dis-

(1) The draft ran as follows:—

"Disbursements.

"1311*l.* 7*s.* 6*d.* stg.

"Savannah, Ga., Jan. 20, 1899.

"Three days after arrival (or upon collection of the freight, if sooner made) of the British steamship *Dora Forster* under my command at the port of Liverpool or any other place at which her voyage may terminate, I promise to pay to the order of

bursements at and from Savannah, amounting to 546*l.* 0*s.* 7*d.* Both drafts included 2½ per cent. commission for the advance, and 1 per cent. for insurance. These two amounts were insured by the charterers on separate certificates of insurance with the Firemen's Fund Insurance Company of San Francisco, and, on the total loss of the vessel, the Georgia Export and Import Company claimed and recovered these amounts from the insurance company. (1)

With regard to the payment of 6½ per cent. on account of repairs, the London secretary of the defendant company was called, and stated that the defendants had no information in January when they paid on account, or in April when they settled for a total loss, beyond the letter of the average adjuster, and that they paid the sum of 52*l.* as a discharge pro tanto of their liability for particular average expenses, the practice of

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Georgia Export and Import Company the sum of thirteen hundred and eleven pounds seven shillings and sixpence British sterling, in approved bankers' demand bills on London, for value received, for necessary disbursements owed by my vessel at this port, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of this obligation all my lien and claim against freight, vessel and owners, with power to take in my name any and all steps necessary to enforce the same, and my consignees at port of discharge are hereby instructed to pay this obligation and deduct the amount thereof from the freight due said vessel, in case of non-payment the holder shall also be entitled to the benefit of all liens in law, equity or admiralty which the master or owners of the vessel may be entitled to against any part of the cargo or its owners for freight, compress or other charges on cargo paid by the vessel or master at the port of loading.

"This claim to have priority of payment over all others that may be presented against the said freight and vessel.

"My vessel is now lying at the port of Savannah loaded with various and ready to sail for Liverpool.

"Signed in triplicate, one being accomplished, the others to stand void.

"John B. Woolley,

"Master of the SS. *Dora Forster*."

(1) The cost of the repairs included a low-pressure cylinder ordered by the plaintiffs of the North Eastern Marine Engineering Company, Limited, to be ready for the arrival of the *Dora Forster* at an agreed price of 280*l.*; but this, being useless owing to her loss, was broken up and as scrap metal, its value, 15*l.*, was, on April 20, 1900, credited to the plaintiffs. It was stated at the trial that a settlement would be arrived at in respect of this matter, failing which the parties were to be at liberty to apply.

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settling "on account" subject to final adjustment being now common. The secretary of the Ocean Marine Company gave similar evidence as to the practice.

May 8. *Carver, Q.C.*, and *Roche*, for the plaintiffs. The Institute clause contained in the policy as to the non-liability of underwriters for unrepaired damage, in addition to a subsequent total loss, does not apply, as the repairs were actually completed and paid for at Savannah. There was, therefore, no merger of an unrepaired loss in a total loss, and the underwriters, who are defendants in this action, are liable for their proportion of the cost of these repairs as representing the particular average damage to the ship, just as though the vessel had not been lost: *Lidgett* v. *Secretan* (1); *Stewart* v. *Steele* (2); nor are the underwriters entitled to the benefit of the American insurance, for they did not provide the funds at Savannah, nor was the borrowing of the money made or the insurance effected on their behalf. The charterers for their own security effected the insurance to cover their interest in the disbursement drafts against sea perils.

[GORELL BARNES J. But the plaintiffs never were personally liable, and, in the events which have happened, they have sustained no loss.]

The repairs were ordered by the plaintiffs through their agent, the master, and they were done on the credit of the plaintiffs as owners of the ship and under a pledge of their property. The form of the draft shews that the shipowners, through their master, made themselves, their ship, and the freight responsible for the payment of the full amount.

The defendants must be taken to have agreed to indemnify the plaintiffs against the liability for the cost of the repair of damage which actually occurred. If the ship had duly arrived at Liverpool, the money would have been paid out of the freight due to the plaintiffs, and it is immaterial that, as the result of the financial arrangement between the plaintiffs as borrowers and the charterers as lenders, the latter have, owing to the total loss of the vessel, made no claim upon the plaintiffs.

(1) (1871) L. R. 6 C. P. 616. (2) (1842) 5 Scott, N. R. 927.

[Arnould on Insurance, 6th ed. p. 946, Leake on Contracts, 3rd ed. p. 417, and Abbott on Shipping, 13th ed. p. 139, were referred to.]

Joseph Walton, *Q.C.*, *J. A. Hamilton*, and *Balloch*, for the defendants. There never was a particular average loss for which the underwriters are liable, because under the circumstances the assured did not in fact pay, and are not liable to pay, for the repairs. Any possible liability of the assured for the repairs was discharged on the acceptance by the charterers of the remedies under the draft, and the remedies under the draft were discharged on the total loss of the vessel, for the charterers insured that risk, and their underwriters have paid them. The plaintiffs have not, therefore, been at any expense and have not suffered any loss in connection with the repairs at Savannah for which they can make a claim for particular average contribution.

Secondly, the settlement of 6½ per cent was a payment made "on account" of a claim, if any, and, the payment having been made without prejudice under a mistake of fact, must be refunded.

[Phillips on Insurance, 5th ed. ss. 1266, 1267, and *Livie* v. *Janson* (1), were referred to.]

Carver, *Q.C.*, in reply. The defendants, as underwriters on hull and machinery, are not entitled to the windfall due to the fact that the charterers had settled for the repairs as disbursements payable by draft on ship's arrival and secured themselves by insurance.

Cur. adv. vult.

May 11. GORELL BARNES J. [After stating the nature of the action, the learned judge continued:—] If the underwriters are liable for the cost of the repairs, then the claims against the underwriters on the policy are twofold, namely, a claim for a particular average loss in respect of the admitted damage on the outward voyage caused by perils insured against, and a claim for a subsequent total loss. The latter claim has been paid by the underwriters, and the dispute is whether, in

(1) (1810) 12 East, 648.

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the circumstances which have happened, there is any liability on the part of the underwriters for the partial loss.

The point arises in this way. The plaintiffs have not and will not sustain any loss in fact in connection with this particular average accident; but it is, nevertheless, contended that the defendants are liable to pay for it. I am aware that occasionally what I may term excessive indemnity is obtained, so that it cannot be said that a contract of insurance is a contract of perfect indemnity; but, usually speaking, a contract of insurance is considered to be a contract of indemnity. Counsel for the plaintiffs, however, maintain that, although they have not sustained any loss, still the defendants are liable to indemnify them against it. Against what? That is the point in the case. The plaintiffs admit that they have not lost and will not lose anything, yet they want from the underwriters something like 1250*l.*, of which the figures given in the statement of claim (76*l.* 16*s.* 9*d.*) represent the defendants' share. It may be that this is a claim legally justifiable, but I cannot think that it can be justified from a business point of view; however, I have to decide the legal rights of the parties, and these give rise to a somewhat difficult point. In order to appreciate the point it is necessary to state how it comes to be made.

The ship was chartered to the Georgia Export and Import Company, and the charterparty contained this clause: "All ordinary disbursements at port of loading"—that is Savannah—"to be paid by the charterers, who are to be reimbursed for the amount thereof with 2½ per cent. commission thereon, and cost of insurance added, at the current rate of exchange, by master giving the usual draft, payable three days after arrival at the port of discharge to the order of the charterers or any other parties advancing the said money, and the agents, with the consent of the owners, do hereby authorize the captain to sign such draft, and said disbursements and said draft shall be a lien against the vessel and freight, taking precedence of all other claims, except the one for difference in freight." When the master arrived at Savannah he communicated to his owners the fact that his ship was

damaged and required repairs, and he proceeded to obtain tenders for the repairs. A tender was sent in by one firm addressed to the master for $5740, and was accepted. In the tender there is no provision as to how the money is to be paid which seems to me important; but documents have been put in to shew what took place at Savannah, leaving me to infer from those documents what in fact took place. On January 1, 1899, the master wrote to his owners: "All expense, after loading, such as wharfage, towage, &c., I will keep separate, as I presume that can be claimed from the underwriters. The Georgia Export Company are willing to pay the repairs' account, the same as usual disbursements. Unless I receive instructions from you I will do that." From that letter and the charter-party I have to infer what was really taking place. Mr. Hunting stated in the witness-box that the clause in the charterparty which I have read was a very usual clause in the trade, and it seems to me that, when the master had to arrange for his ship being repaired, he had to consider how he was going to pay for it. The meaning of the letter is I think clear, namely, to pay for the repairs to the ship in the same way as that in which the charterparty provided the master should pay for the ordinary disbursements of the ship, though this would be an extraordinary disbursement, and would not, therefore, primâ facie, be within that clause. The master, knowing the course of business, meant to say, "I am going to arrange this business in the same way that I should arrange the ordinary disbursements of the ship"; and it is remarkable, on looking at the correspondence, to find that the owners of the ship tried afterwards to get the master to arrange with the repairers that they should accept a draft upon them for the cost of the repairs, but the repairers refused to do so.

The inference I draw as to what took place between the different parties at Savannah, and the conclusion to which I have come as a matter of fact from the documents put in, is that there was an arrangement between the master and the Georgia Export Company and the repairers of the ship that the master should act in the discharge of the cost of repairs in the same way as that in which he was bound, under the charter-

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party, to act in connection with the ordinary disbursements of the ship.

The repairs were completed, and I infer that the Georgia Export Company then paid the repairers of the ship the amount of their bill, for which a receipt has been put in. They then proceeded to prepare a draft, which is headed, "Disbursements, Savannah, Jan. 20, 1899," and purports to be, "For value received, for necessary disbursements owed by my vessel at this port." There is a similar draft, practically in the same terms, for 546*l.*, for the ordinary disbursements of the ship.

The draft was drawn by the master of the ship in favour of the Georgia Export Company, and the Georgia Export Company insured the draft with the Firemen's Fund Insurance Company of San Francisco. I understand that when the vessel was totally lost on her voyage home, the Georgia Export Company claimed from the Firemen's Fund Insurance Company the amount insured on the draft, which included the amount of the repairs, the commission, and the insurance upon them, and that they were paid the amount thus insured. They, therefore, never made any claim, nor could they make any claim, upon the owners of the ship to reimburse them the cost of the repairs to the ship which they had discharged. The plaintiffs, however, in effect, say, "Our ship was damaged and our ship was repaired, and we became liable to pay the cost of the repairs, and although we have not paid anything, we have a claim upon the underwriters, for which we ought to be "—I cannot use the word indemnified—"paid."

The question is whether those facts give rise to any claim against the underwriters on the original policy on the ship. In my opinion they do not, and my reason is this: I have found as a fact that the master at the port of shipment, when he was arranging for these repairs to be done, arranged with the parties that they should be liquidated in the same way as the ordinary disbursements were going to be liquidated, and I think he carried out the transaction in such a way that the owners of the ship never became liable to pay for the cost of these repairs. That brings the case within the principle stated in s. 1267 of

the 5th edition of Phillips on Insurance: "In England and the United States the underwriters are unquestionably liable for a subsequent total loss, in addition to the expense of previous repairs which have been previously paid for by the assured, in distinction from those made by means of funds raised on bottomry." The meaning of that passage is, that where a particular average damage has been incurred, and the master arranges for the repairs which are thus necessitated being discharged by means of moneys raised on bottomry, he never imposes any personal obligation to pay those moneys upon the owners of the ship, or any obligation upon them to pay if the ship is lost on the voyage home; and that, therefore, if the vessel is lost on the voyage home, and the underwriters pay a total loss, the assured does not in fact sustain a partial loss, because he never has to pay for it, and is adequately and properly indemnified by being paid by his underwriters for the subsequent total loss. There is no doubt that, in the case of bottomry, that meets the necessity and the justice of the case.

The decision I have come to in this case is that there is, legally speaking, no substantial distinction which I can detect between the case of bottomry and the present case.

I am much assisted in arriving at the conclusion of law and fact to which I have come by the view taken by Sir Robert Phillimore in the case of *The Karnak* (1) with regard to the presumption, or, perhaps I ought to say, inference, which ought to be drawn in a case of this class. He says (2) that he is "of opinion that, in the absence of all evidence, the presumption must be that the foreign lender made the advances in contemplation of a bottomry security, and that this presumption is increased where the lex loci empowers the lender to arrest the ship in satisfaction of his demand." I think I am quite justified on the materials laid before me in presuming and inferring that the repairer of this ship meant to have the repairs paid for in the way I have suggested, and meant to have them paid before the ship left the port, and that in doing so he was looking to have his advances paid, not by bottomry exactly, but in a way which this course of business, when properly

(1) (1868) L. R. 2 A. & E. 289. (2) L. R. 2 A. & E. at p. 301.

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understood, shews is substantially of the same nature—that is to say, making the liability of the owner of the ship dependent upon the arrival of the ship at her port of discharge, in which case the draft is to be paid three days after arrival. I have also little doubt, though no evidence has been given about it, that the repairer of the ship did not let the ship go without being secured in the way I have suggested. This particular case raises a stronger presumption than that which Sir Robert Phillimore suggested should be drawn in the case with which he was dealing, because there is actual evidence here from which I think I may, and ought to, infer that what took place was what I have in substance stated. There is no doubt that it is the way in which the parties treated this case, though when the claim was put forward in this country the assumption was that the owners of the ship were liable at the outset to discharge this claim, and that what took place between other underwriters was immaterial. If, however, I am correct, that point is entirely disposed of, and, therefore, this case is of quite a different class from that of *Lidgett* v. *Secretan* (1), upon which counsel for the plaintiffs relied, because there never was a loss for which the owners of this ship could make any claim.

The conclusion of fact to which I have come is that the law is in accordance with the business view of the matter, namely, that the plaintiffs have not sustained any loss against which they can ask to be indemnified, and my judgment, therefore, is for the defendants.

One other point remains, and that is that the defendants have already paid 52*l.* on account, and this they seek to recover. The money was paid in this way. As soon as it was known that the ship had been damaged, and sufficient information as to the extent of the damage was received in this country, the average adjuster sent round a letter stating the position up to that date, and in substance advising that the underwriters might safely settle on account towards the cost of repairs, and accordingly, in January, this settlement on account was made. Later on, in April, a total loss was settled.

(1) L. R. 6 C. P. 616.

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The plaintiffs now say that the defendants cannot have this money back because they have paid it in discharge of liability. The defendants say that they paid it on account of any liability which they should ultimately be found liable for. I think the money was paid, without prejudice, on account of the ultimate liability, if it turned out that there was any ultimate liability. For instance, when the money was paid the repairs were in progress and they might never have been completed. The ship might have been destroyed by fire in the meantime, and the expense of repairs never incurred, and it cannot be that where there is no liability the owners are entitled to retain money which has been paid in such a way. It was paid under a mistake of fact, and in the way in which the witnesses for the defendants have said—that is, on account of what they might ultimately be found liable for. There being no liability, the money should be returned.

For these reasons I am of opinion that the judgment of the Court ought to be for the defendants on both the claim and counter-claim, with costs.

Solicitors for plaintiffs: *Stokes & Stokes, for Bramwell & Bell, Newcastle-on-Tyne.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

T. L. M.

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May 9, 11.

THE SAVONA.

Admiralty—Charterparty—Damage to Cargo—Excepted Perils—Discharge in Port of Refuge—Refusal of Shipowner to Reload—Abandonment of Voyage—Duty of Master.

Owing to stress of weather, a vessel, after sailing under charter from Cardiff for Cape Town with coals, put into a port of refuge. The coal was discharged partly to effect the necessary repairs to the ship, and partly for the benefit of the cargo, portions of which had become heated from wetting by excepted perils of the sea. After the repairs to the ship were completed, the charterer required the shipowner to reload the coal; the shipowner refused on the ground that in the opinion of the surveyors on both sides the coal was not then in a fit state for re-shipment, though, subsequent to the commencement of an action by the charterer against the shipowner for breach of contract, the coal had dried sufficiently to be carried on if the small coal were eliminated from the bulk:—

Held, by Gorell Barnes J., that the charterer was not entitled to recover, as, at the date of the issue of the writ, there was no breach of contract by the shipowner. Up to that time, on the evidence before him, the master, acting on behalf of the shipowner, was justified in refusing to carry on the cargo, and was not bound to wait an indefinite period until experts should be agreed that, the coal being dry, there would be no further risk of spontaneous combustion on a voyage through the tropics, provided the excessive amount of small coal, due to repeated handlings, were removed, for which no facilities existed at the port of refuge, except at an expense out of proportion to the value of the cargo.

Observations of Willes J. in *Notara* v. *Henderson*, (1872) L. R. 7 Q. B. 225, at p. 237, applied.

Action in rem for damages for breach of contract to carry a cargo of coal. The plaintiffs were Donald Currie & Co., managers of the Union Castle Mail Steamship Company, Limited, owners of the cargo; the defendants were the owners of the *Savona*, and were resident in Canada, but acted through brokers in London.

The case raised the question as to the time when, and the circumstances under which, the master of a chartered vessel, in a port of refuge, is justified, in the exercise of his discretionary power, in refusing to re-ship cargo damaged through excepted perils, and in deciding to abandon the voyage.

The facts were shortly as follows:—

By charterparty dated October 27, 1899, made between the

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plaintiffs and the defendants, it was agreed that the *Savona*—a Nova Scotian wooden sailing ship of 1584 tons—should load at Cardiff a full and complete cargo of coals, and proceed therewith to Cape Town, and deliver the same. Freight to be 19*s.* 9*d.* per ton, of which two-thirds less 5 per cent. for all charges was to be paid in London within eight days of the final sailing of the vessel. Under this charter 2377 tons of Nixon's navigation steam coal were duly loaded, and, on December 22, the vessel sailed; but she encountered very heavy weather in the Bay of Biscay, and, after losing some sails, yards, boats, three top-gallant masts, and getting four feet of water in the hold through the hatches, together with a leakage in the deck near the main-mast, her master, on December 31, when off Cape Finisterre, decided to put back for a port of refuge, and, on January 8, 1900, the vessel arrived at Falmouth.

Owing partly to effect the necessary repairs and partly owing to the condition of the coal, which in consequence of being wetted had become heated, it was found necessary to discharge the cargo. The coal was accordingly stored in three covered sheds, where it was well ventilated, and the conditions favourable for cooling.

During the discharge the coal was surveyed on behalf of both parties. A Mr. Buckley, who examined its condition for the plaintiff cargo owners, reported on January 12 that "the risk would be too great for the vessel to proceed with the cargo to Cape Town." A Mr. Downing, on behalf of the defendant shipowners, reported in similar terms.

On January 15 the plaintiffs gave notice of abandonment to their underwriters, who, however, refused to accept the abandonment. On February 23 Mr. Buckley made a further report that, "having carefully considered the facts as stated in my daily reports on the cargo, which embrace twenty-nine inspections from January 24 to February 22, exclusive of my original inspection on January 12, I am of opinion that the condition of the coal renders it totally unfit for re-shipment to any port beyond the tropics." Mr. Downing also repeatedly inspected the coal whilst being discharged, and on February 23

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similarly reported that the "cargo is unfit for re-shipment to Cape Town"; but it was alleged that a surveyor inspected the coal on behalf of the underwriters on cargo, and that, after the cargo had been completely discharged by the end of February, he reported that the whole of it was fit for re-shipment.

Correspondence ensued between the parties, and, on March 7, the brokers in London acting for the defendant shipowners wrote to Donald Currie & Co. a letter which was treated at the trial as a refusal by the defendants to carry the coal on. It was in these terms: "We shall now be glad to hear what course you propose to adopt with regard to the cargo. As we have already told you we are advised that the cargo is unfit for re-shipment, and, so far as the owner is concerned, he proposes to abandon the voyage, and is claiming his loss of freight from his underwriters." On March 9 Donald Currie & Co. replied by a letter which was treated at the trial as a request by the plaintiffs to the defendants to carry the coal on. It ran: "We are in receipt of your favour of the 7th, and in reply beg to inform you that the underwriters have declined to agree to the abandonment of the cargo, and consequently we see nothing for it but for the ship to complete her voyage."

On March 28, the writ in the action was issued claiming damages and general average contribution. (1) Bail having been given, the ship was released; and it was alleged that the plaintiffs then chartered a sailing ship to proceed to Falmouth, and carry the coal on at 26*s*. per ton. This point and the general nature of the evidence given at the trial by analytical chemists as to the condition of the coal when examined by them, subsequent to the refusal by the shipowners to carry the coal on, are fully dealt with in the judgment, as also the question whether the coal ought not to have been discharged in such a way as to separate the wet from the dry, together

(1) A doubt having been expressed by the Court, during the hearing, whether an alternative claim for general average contribution could be maintained in an action in rem against the ship under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), this portion of the claim was, by consent, withdrawn; the brokers for the defendant shipowners giving an undertaking to the plaintiffs that service would be accepted in this country of any process in respect of this claim.

with the further question as to the time and expense that would be involved in re-shipment at Falmouth, where no facilities exist for tipping the coal into the vessel.

May 9. *Scrutton*, for the plaintiffs. The defendants having received two-thirds of the freight in advance, and the balance at risk being insured, are naturally not anxious to re-ship the cargo and resume the voyage; but, assuming that the cargo was necessarily discharged owing to heating and wetting by perils of the sea, the evidence of the experts shews that all traces of moisture or damage have now disappeared, and that the only difficulty which can be raised is that of unavoidable breakage due to the discharge. It is, however, clear that in a cargo of coals shipped at Cardiff a large proportion of small coal is always present about the hatchways owing to the method adopted of tipping the coal direct into the vessel, so that there is nothing unusual in this respect in the condition of the cargo, and any expenses incurred for screening will not fall on the ship, as these are particular charges on cargo. The shipowner is in charge of the cargo. He must take reasonable care of it, and, if necessary, delay the adventure to repair damage, though caused by excepted perils, so long as the time involved does not amount to deviation: *Notara* v. *Henderson*. (1) The fact that another vessel is now going to take the cargo on to Cape Town shews that the coal is fit for re-shipment (2), and the defendants' refusal to load the coal again and carry it on constitutes a breach of the charterparty for which they are liable in damages.

In *Assicurazioni Generali* v. *SS. Bessie Morris Co.* (3) it was held that the shipowner was bound to repair and resume the voyage, unless it was either impossible physically or from a business point of view. Here the evidence is that the repairs

(1) L. R. 7 Q. B. 225.

(2) It was suggested during the hearing that the case should be adjourned until news was received of the arrival at Cape Town of the sailing vessel alleged to have been chartered for the conveyance of the coal; but on the defendants insisting that in that event a joint commission would be necessary to inquire into the condition of the cargo on arrival, the plaintiffs elected to proceed with the action without an adjournment.

(3) [1892] 2 Q. B. 652.

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to the ship are complete, and that the coal is now fit to be carried on, being cool, and the moisture under 2 per cent., which leaves a large margin of safety.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. There was no breach of contract by the defendant shipowners in declining to re-ship the cargo and resume the voyage at the time when the repairs to the ship were completed. The cargo had in parts become saturated with sea-water. It had in consequence become heated. It was, of necessity and with the plaintiffs' assent, discharged. On examination it was found to be in an unfit state to be reloaded within a reasonable time and carried on, and the defendants were thereupon excused from doing so by reason of excepted perils, namely, perils of the sea.

Admitting that the shipowner is bound to do what is reasonable to take on the cargo, still he can only act on the best available information, using the best of his discretion in the interests of all concerned, and is not bound to wait an indefinite period. It is submitted that the master acted reasonably in declining to take the risk of re-shipping the cargo, for at the date of the issue of the writ, namely, March 28, the coal was, according to the evidence of the surveyors on both sides, unfit to be carried on, and, assuming that the source of danger arising from the presence of a considerable quantity of small coal could be removed by screening, and that the remainder of the coal is now sufficiently cool and free from moisture to be carried on, the evidence shews that the cost of screening would render the re-shipment of the coal an unreasonable proceeding in a commercial sense.

Scrutton, in reply.

Cur. adv. vult.

May 11. GORELL BARNES J. [After stating the facts, reading the correspondence, and referring to the reports already set out, the learned judge continued:—] It seems to me that this case must be dealt with as at the date at which the action was commenced, namely, on March 28. At that time the plaintiffs, on the one hand, insisted that the cargo must be carried on,

though, I think, it is clear that they did not themselves desire this to be done, but were forced to take up that position by their underwriters. The defendant shipowners, on the other hand, contended that the cargo ought not to be carried on.

The question, therefore, to be decided is: whether, at the date of the issue of the writ, there was a breach of contract on the part of the shipowners, because it must be made out that there was a breach at that time in order to establish a right of action. The evidence consists practically of the reports of Mr. Buckley and Mr. Downing, who saw the cargo and advised upon it up to that date, with the exception of the underwriters' surveyors, who have not been called, though they seem to have seen it. Mr. Buckley and Mr. Downing were of opinion that the cargo was not fit for re-shipment, and they substantially maintain that opinion up to the present time, based upon the condition of the coal as seen by them as it was discharged. The further evidence which has been given by the plaintiffs and by the defendants is with reference to what took place after that date. The plaintiffs called an expert analyst who saw this cargo on April 27, and another expert analyst, Dr. Dyer, who, in consequence of Mr. Nimmo's reports on samples, made an analysis of the coal, though he did not see the cargo itself. Mr. Addie saw the cargo on March 31, that is, after the date of the writ, and Mr. Millbank of the Salvage Association saw it on behalf of the plaintiffs on May 5. Now, the evidence of these gentlemen, dealing with it broadly, is to the effect that the cargo is in a condition to be carried to its destination. The evidence of those who saw the cargo on behalf of the defendants is, from first to last, that it is not even now fit to be carried on, although Professor Lewes, a very experienced chemist, considers that, whilst it was not fit to be carried on at the date of the writ, namely, March 28, it could now be re-shipped and carried on if the small coal which has been produced by the different handlings of the cargo were eliminated from it.

It seems to me that the result of the evidence is to shew these two facts: first, that it was not fit to carry on, and was not fit for re-shipment, at any time prior to the issue of the

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writ; secondly, that it is at the present date fit to be carried on, provided the cargo has eliminated from it the large proportion of small coal which, according to the evidence, would constitute a source of danger in respect of spontaneous combustion if it were shipped with the rest of the coal. Assuming that to be the conclusion to be drawn from the evidence, a question of very considerable difficulty arises; but, before I deal with it, I will dispose of one point raised by the plaintiffs, namely, that in the course of the discharge of the cargo those responsible for the care of it—that is, the master, acting through his agents—might have separated the wet coal from the dry, and placed the dry coal in a position to be reshipped. That seems to be a practical question, which the defendants have met by evidence that, having regard to the general nature of the wetting which the coal had received—that is, wetting, not over the whole of it, but in a great many different places—it was not a practicable matter. I have consulted the Elder Brethren about this, and—taking the evidence upon the point given by the defendants, which is, I think, correct—their opinion is that it would not have been a practicable matter to have separated the dry coal from the wet—in other words, that there was nothing wrong in the mode in which the coal was discharged, or in the mode of storing the coal ashore, or in dealing with it in the way in which it was in fact dealt with. Having disposed of that point, I come to the question which I have to solve with regard to the unfitness of the cargo and its subsequent fitness for re-shipment if something was done to it, which seems to me to go to the root of this case.

Shortly before the issue of the writ, the parties were face to face, for the plaintiffs said (really for the underwriters), "The cargo must go on"; and the defendants said, "We cannot take it on." I have to consider what, then and there, ought to have been done—in other words, whether the master committed a breach of contract by refusing to carry the cargo on, which I have found was at the time unfit to be re-shipped and carried to its destination in safety. That, I think, is really, after the findings of fact, more a matter of law than of fact. But there is one matter about which I have asked the Elder Brethren their opinion, because it fortifies the position which

I think is the correct one to take up, having regard to the law applicable to this case, and that is:—whether from a practicable business point of view the master of the ship—who had been informed by everybody who saw the cargo up to that time, including the surveyors on both sides, that it could not be carried on safely—would be justified in taking the risk of reloading and carrying it on. On this point the Elder Brethren take a strong view, and say that no master—having regard to the danger which was to be anticipated of spontaneous combustion, and to the materials for forming a judgment which both sides placed before him at that time—would have been justified in taking the risk of re-shipping the cargo.

It is said, however, that that will not get rid of the difficulty, because, as matters have subsequently turned out, by waiting two months or so the cargo, after something has been done to it, might be re-shipped, and that the plaintiffs, acting for the underwriters, are proceeding to re-ship it, and have chartered a ship for the purpose. But I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered.

The position, therefore, is this: At the time when this action was commenced everybody who saw the cargo agreed that it could not be re-shipped with safety, and I have stated the view of the Elder Brethren as to the risk which the master would have taken on himself by acting in defiance of that opinion. It seems to me that—regarding the matter at that time—there was nothing to shew how long it might possibly be before those concerned could come to the conclusion that the cargo could be re-shipped. Then the master, looking at the matter from the point of view of time, would have to face this position: "I cannot ship this cargo now. Everybody agrees that the risk would be too great. How long am I to wait until it is possible to do so?" That was a problematical matter, as is shewn by the fact that some of the experts called maintain that even now it is not fit to be re-shipped. How long is a master face to face with that position to wait till he

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can make up his mind that he can carry the cargo without risk to the ship and to the lives of those on board of her?

I do not think that the observations which were referred to by counsel and to be found in *Notara* v. *Henderson* (1) are precisely applicable to this position; but they illustrate the difficulty in which a master is placed who has to face the question whether he shall reload and carry a cargo on or not. In that case Willes J., delivering the judgment of the Court, said (2): "A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty."

In this case it appears to me that the plaintiffs—the nominal plaintiffs, because they represented the underwriters—left the master to deal with this matter and determine it. The correspondence substantially shews that, especially the letter in which the plaintiffs say, "We see nothing for it but for the ship to complete her voyage." What was the master to do? My opinion is that he was—taking all the circumstances into consideration — justified in saying that the cargo could not safely be re-shipped, and that he must refuse to do it; that he was not bound to wait for weeks, or it might be months, to ascertain whether it would be fit at some future date, when

(1) L. R. 7 Q. B. 225. (2) L. R. 7 Q. B. at p. 237.

something had happened in the way of further drying, or something had been done to it in the way of screening.

The only other point I think it necessary for me to refer to is this—that I have found, as a fact on the evidence, that even now it is not safe to re-ship the cargo without the separation of the small coal as indicated by Professor Lewes. With regard to that point, the witnesses said that there were no facilities for carrying out the separation at Falmouth, and that the time and money which would be involved were out of all question. That element, I think, comes into consideration in arriving at the decision at the time, because it is not merely a question of risk of re-shipment or of waiting, but it is also a question of the cost which would have to be incurred if the master has to act so as to produce a state of safety at a much later period. If the time and expense involved are out of all proportion to the value of the cargo, which is the opinion of those who have given evidence on the point, and about which there is no conflict, I think that that further element must be taken into consideration in determining, at the time, whether the master is then and there bound to decide to take the cargo on.

A strong point made by the plaintiffs is that they say "Some one else is willing to do it"; but that is at a long period afterwards, when circumstances have entirely changed, and it is to be done under a contract by the underwriters, who are bound to pay all the forwarding expenses. That is not the same position as if the re-shipment had been taken up at the simple risk of merchants on the one side with the shipowners to deal with on the other side.

The case is one of some difficulty, but, exercising the best judgment I have been able to form, and having regard to all the facts, I am of opinion that there was no breach of contract by the shipowners entitling the plaintiffs to recover in this action.

Judgment for defendants.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

C. A.
1900
May 15.

[IN THE COURT OF APPEAL.]

THE PHILADELPHIAN.

Admiralty—Collision—Anchor Light—"Forward part of the Vessel"—Regulations for Preventing Collisions at Sea, 1897, *art.* 11.

By art. 11 of the Regulations for Preventing Collisions at Sea, "a vessel of 150 feet or upwards in length, when at anchor, shall carry" two anchor lights, one "in the forward part of the vessel. . . ."

Held, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), overruling Bucknill J. (ante, p. 43), that a vessel 313 feet in length, at anchor, with the forward light hanging from the foreshroud of the starboard forerigging 72 feet abaft the stem, was, on the true construction of the wording of the article, carrying it "in the forward part of the vessel."

Appeal by defendants, the owners of the *Philadelphian*, against a decision of Bucknill J. (1)

The case is reported only on the question of the meaning to be attached to the words "forward part of the vessel," in the second paragraph of art. 11 of the Regulations for Preventing Collisions at Sea, 1897. (2)

The facts, so far as material, were shortly that:—

On August 10, 1899, about 11 p.m., a collision occurred in Quebec Harbour between the British steamship *Ella Sayer*, owned by the plaintiffs, of 2549 tons gross register, and 313 feet in length, lying at anchor heading up river, and the British steamship *Philadelphian*, which was proceeding down the river St. Lawrence.

At the time of the collision the *Ella Sayer* was carrying two anchor lights, the one forward hanging from the foreshroud of

(1) Reported ante, p. 43.

(2) Art. 11: "A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to shew a clear, uniform, and unbroken light, visible all round the horizon at a distance of at least one mile.

"A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height not less than 20, and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light."

the starboard forerigging, 23 ft. 6 in. above the forecastle deck, 8 feet from the centre of the mast, and 72 feet abaft the stem.

The learned judge in the Court below found the *Philadelphian* alone to blame for bad look-out and excessive speed, and with reference to the position of the forward anchor light of the *Ella Sayer* said: "I hold that to put a light in a vessel 313 feet in length, 60 or 70 feet abaft the stem, is not to place it in the forward part of the vessel, and if it was important in this case I should find that it was not in compliance with the article. . . . But whilst I am putting this construction upon the rule, it will not in this particular case affect the judgment of the Court with regard to the responsibility of the *Ella Sayer*, because, although I find that the light was not placed in accordance with art. 11, on my construction of it, I find also, that that could not by any possibility have contributed to the collision. I say that for this reason, that the defendants' witnesses never saw the light at all."

On the appeal it was admitted, on behalf of the defendants, that their vessel, the *Philadelphian*, was to blame, and the only contention was whether the *Ella Sayer* was also to blame.

Joseph Walton, Q.C., Aspinall, Q.C., and *Glynn*, for the appellants (defendants). On the findings of fact in the Court below the *Ella Sayer* ought also to have been found to blame, as those in charge of her were guilty of an infringement of art. 11 of the Regulations for Preventing Collisions at Sea, by not properly exhibiting a forward anchor light, that is to say, by not carrying that light in a proper place where it could "best be seen," and it is submitted that the learned judge in the Court below was wrong in holding that the infringement could not by possibility have contributed to the collision.

The object of two anchor lights in the case of a vessel exceeding 150 feet in length obviously is to give other vessels information as to her length, so that when she is swinging to her anchor across their path they may know how to avoid her. In the case of the after light the rule says that it must be "at

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or near the stern of the vessel," and, in *The Gannet* (1), this Court held that to hang the after light 120 feet from the stern on a vessel 455 feet long was a breach of the statutory rule. So in this case hanging the light at a distance, now accurately ascertained to have been 72 feet abaft the stem on a vessel 313 feet in length, is a breach of the statutory rule, inasmuch as it is not carried "in the forward part of the vessel" within the meaning of the rule. The intention is that one light shall be forward and the other aft, otherwise they are misleading, and, therefore, dangerous. If the forward light had been hung, as is usually the case, on the forestay, it would have been further forward, and if on the foretopmast stay considerably further forward than it in fact was. To comply with the rule the forward light should be at or near the stem, and the after light at or near the stern.

Laing, Q.C., *Dawson Miller*, and *Roche*, for the respondents (plaintiffs), the owners of the *Ella Sayer*, were not called upon.

A. L. SMITH L.J. It is not disputed that the *Ella Sayer* had a proper anchor light in the forward part of the vessel, and a proper anchor light in the after part of the vessel, but it is alleged that the light in the forward part of the vessel, which was hung on the foreshroud of the starboard forerigging, was not in a proper position. In the Court below Bucknill J. held that the position of the light made no difference, as the defendants were not looking out, and, therefore, the defendants would not have seen it in whatever position it had been; but he has put an interpretation upon the meaning of the word "forward" in art. 11 of the Regulations for Preventing Collisions at Sea which we have to consider. [The learned judge read the article already set out, and continued:—]

As the *Ella Sayer* was more than 150 feet in length, the first part of the rule does not apply, and it is upon the wording of the second paragraph that this appeal turns. Now, the vessel was 313 feet in length, and as the forward light was 72 feet from the stem it was less than a quarter of her length from right forward, it was well before amidships, and was not in the

(1) [1899] P. 230; reversed, but not on this point, [1900] A. C. 234.

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after part of the ship—in fact, it was in the forward part of the ship. Then what does the rule say? "A vessel of 150 feet or upwards in length, when at anchor, shall carry"—where? Not at or near the stem. No place is mentioned as regards the stem—the words are, "in the forward part of the vessel." It is not for us to inquire whether the forerigging is a place where ships ordinarily carry anchor lights, or whether they ordinarily carry the light on the forestay. That is not the point. The question is what is the construction of the rule which requires the light to be carried "in the forward part of the vessel, at a height not less than 20, and not exceeding 40, feet above the hull." It is not denied that the light shewed an unbroken light all round as required by the rule.

Now, where does the rule say that the after light is to be carried? This is material in construing the rule. It does not say that it is to be carried "in the after part of the vessel," as in the case of the forward light, which is to be carried "in the forward part of the vessel"; but the rule says that the after light shall be carried "at or near the stern," so that it is not competent to read the two clauses as though they were, "Forward light to be at or near the stem, and after light at or near the stern," though counsel for the appellants have argued that the first part of the second paragraph of the rule ought to be read, "in the forward part of the vessel at or near the stem," and they also suggest that we ought to read in the words "at or near the stem," because they say the meaning of the rule is that, if the length of the ship is over 150 feet, the light might not, if placed elsewhere than at or near the stem, be a guide to an approaching vessel; but if that is the meaning of the rule, its framers have not drawn it so as to carry out their intention. The framers of the rule for some reason have said that the forward light shall be carried "in the forward part of the vessel" and the after light "at or near the stern," and we should not be justified in reading the suggested words into the rule.

It seems to me, therefore, that this light which was hanging from the foreshroud of the starboard forerigging was, within the terms of the rule, "in the forward part of the vessel."

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In dealing with this matter I should like to refer to art. 2 of the rules about the lights of a steam vessel under way. It is there stated that "A steam vessel when under way shall carry on or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel." From this it will be seen that the rule we are dealing with is in the same category as this rule with regard to where the light is to be, namely, in the fore part of the vessel.

As this is the only point requiring our decision, I am of opinion that the appellants have not made out that the *Ella Sayer* was guilty of a breach of art. 11 of the Regulations for Preventing Collisions at Sea.

VAUGHAN WILLIAMS L.J. Counsel for the appellants admitted in the course of the argument that the construction contended for with reference to the forward light required the second paragraph of art. 11 to be read as if it contained the words "at or near the stem of the vessel." It seems to me that that would be doing violence to the words of the rule; and it is also plain to me that, under this rule, so far as the stern light is concerned, the words "at or near the stern" are intended to indicate what amounts substantially to a fixed point; but that the words as to the forward light do not place any limit so as to amount to a fixed point, but allow a discretion.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellants (defendants): *Thomas Cooper & Co., for Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for respondents (plaintiffs): *Botterell & Roche.*

T. L. M.

[IN THE COURT OF APPEAL.]

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H.M.S. SANS PAREIL. (1)

Admiralty—Collision—Single Ship and Fleet of Warships—Crossing Rules—Special Circumstances—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 27, 29—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 741.

On a fine clear night in the English Channel those in charge of a tug and tow saw, about six miles off and about five points on their port bow, the electric lights of a fleet which proved to consist of thirty warships steaming in company, and proceeding at a speed of ten knots an hour on a course S. 72° E.

The tug and tow were making about six knots an hour on a course N. 9° E., and, acting under art. 21 of the Regulations for Preventing Collisions at Sea, kept their course and speed. They passed across and ahead of the first of the four lines of the fleet, and were crossing ahead of the second line, when the defendant, the navigating officer in charge of the leading vessel of that line—acting under the Queen's Regulations corresponding with art. 19 of the Regulations for Preventing Collisions at Sea—kept out of the way of the tug by porting, but negligently omitted to notice the lights indicating the tow, and, starboarding back again, struck the tow and sank her.

In an action by the owner of the tow it was admitted that the defendant was to blame, and Gorell Barnes J. held that he was solely to blame, as he could, by the exercise of reasonable care, have avoided the collision, the position and movements of the fleet, in the opinion of the Elder Brethren, not constituting such a danger of navigation or collision, or such circumstances, as to render it necessary for the tug and tow to depart from art. 21, and, under art. 27, avoid immediate danger by keeping out of the way of the fleet. The defendant appealed on the ground that the tug and tow were also to blame for not complying with art. 27:—

Held, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), on the advice of the nautical assessors, that it was improper navigation, as a matter of seamanship, for the tug and tow to attempt, in the circumstances, to pass across and ahead of the fleet; but the Court dismissed the appeal, on the ground that—under the common law doctrine of contributory negligence, as applied in *The Margaret* (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873—though the tug and tow had been guilty of negligence in keeping on, yet the defendant was not hampered by the

(1) The orthography of the *Navy List* is followed in this repo.t.

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other vessels of the fleet, and might, by the exercise of ordinary care and diligence, have avoided the collision.

The construction to be placed on arts. 27 and 29 of the Regulations for Preventing Collisions at Sea considered.

The effect of s. 741 of the Merchant Shipping Act, 1894, in exempting Her Majesty's ships from the provisions of the Act, discussed.

APPEAL by the defendant, Lieutenant George H. S. Potter, of H.M.S. *Sans Pareil*, against a decision of Gorell Barnes J., finding him alone to blame for a collision between Her Majesty's ship and the *East Lothian*, owned by James Boyd, the plaintiff.

The case raised the question as to the alleged duty of single ships to adopt timely measures to keep out of the way of a squadron of warships.

The facts were shortly as follows:—

On August 7, 1899, about 10.30 P.M., the weather being fine and clear, the *East Lothian*—a full-rigged iron sailing ship of 1389 tons register, with nineteen hands, from Nantes to Cardiff in ballast—was in the English Channel in tow of a tug, the Wolf Rock bearing about N. by W. thirteen miles. Both tug and tow carried the regulation lights, and were on a course N. 9° E. magnetic, making about six knots, when those on board saw, at a distance of about six miles, and about five points on their port bow, a cluster of lights, which were taken to be those of fishing-boats; but as the tug and tow drew nearer, and with the aid of glasses, the lights were made out to be the electric lights of a fleet, which proved to consist of thirty ships of war in four lines, the outer lines formed by cruisers, the inner by battleships, the distance between each line being eight cables, and the distance from the bow of one vessel to the bow of the vessel astern of her two cables. The fleet was proceeding up Channel at a speed of ten knots on a course S. 72° E.

The *East Lothian* and her tug, acting under art. 21 of the Regulations for Preventing Collisions at Sea, kept their course and speed. The leading ship of the southernmost line of cruisers—acting under the Queen's Regulations, corresponding with art. 19 of the Regulations for Preventing Collisions at

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Sea (1)—ported to allow the tug and tow to pass, and they were crossing the line of battleships forming the second division, when the defendant, the navigating officer in charge of the leading vessel, H.M.S. *Sans Pareil*, kept out of the way by porting and passing under the stern of the tug; but, being under the impression that the tug was a steamer proceeding alone, he ordered the helm of the *Sans Pareil* to be starboarded, as soon as he was in a position to clear the tug. Shortly afterwards the defendant observed the red light of the *East Lothian*, and the engines of the *Sans Pareil* were put full-speed astern, but she ran into the *East Lothian* and sank her.

By his statement of claim, in an action of damage by collision, the plaintiff, the owner of the *East Lothian*, charged the defendant with 1. not keeping a good look-out; 2. failing to keep the *Sans Pareil* out of the way of the *East Lothian*; and 3. failing to slacken speed. The defendant, Lieutenant Potter, by his defence alleged 1. that the *East Lothian* and her tug neglected to carry the regulation lights in a proper manner; 2. that the *East Lothian* was being towed with too long a scope of hawser; and 3., the main contention, that the *East Lothian* "improperly attempted, while being towed, to proceed across and through a large fleet of ships of war steaming in company." In support of this third charge, arts. 27 and 29 of the Regulations for Preventing Collisions at Sea were relied on. (2)

(1) Art. 19: "When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

"NOTE.—When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision (see arts. 27 and 29)."

(2) Art. 27: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Art. 29: "Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or

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At the hearing on February 8, 1900 (1)—

Joseph Walton, *Q.C.*, and *Scrutton*, appeared for the plaintiff,

The Attorney-General (*Sir R. E. Webster*) and *Acland*, for the defendant.

It was admitted on behalf of the defendant that the helm of the *Sans Pareil* had been, in the circumstances, improperly starboarded—that is, that the *Sans Pareil* could have passed under the stern of the *East Lothian*, and was, therefore, to blame; but it was contended that the plaintiff's vessel was also to blame upon two grounds: first, that the tug infringed art. 3 of the regulations by exhibiting a light to guide the vessel astern, which shewed forward of the beam; secondly, that the tug and tow infringed art. 27 of the regulations by standing on across the track of the fleet.

With regard to the first point, it was not disputed on behalf of the plaintiff that the tug had infringed the second clause of art. 3 of the Regulations for Preventing Collisions at Sea by carrying the small white light abaft the funnel, for the vessel towed to steer by, in such a way that it was visible forward of the beam; but the Elder Brethren of the Trinity House advised the learned judge that "in their opinion the fact that the white light aft on the tug was visible before the beam of the tug could by no possibility have contributed to the collision," for, "whether the white light aft on the tug was visible from before her beam or not, the other lights on the tug and tow should have shewn unmistakably that they were on a tug and her tow," Gorell Barnes J., in giving a considered judgment on March 1, held that the fact that the white light aft was to some extent visible before the beam of the tug

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of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

(1) The case was re-argued on February 21 on the question of the effect of s. 741 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), in exempting Her Majesty's ships from the provisions of the Act. This point is fully dealt with in the judgment of Gorell Barnes J.

made no difference. This point was not raised on the appeal.

With regard to the second point, the learned judge said:—

"The second point raises a question of very considerable importance. It was contended by the Attorney-General that the tug and tow ought not to have continued their course and speed across the course of the fleet, but should either have waited till the fleet had passed across their bows, or starboarded their helms, and gone under the stern of the fleet, and that, in continuing their course and speed, they were guilty, in the circumstances, of an infringement of the regulations.

"The particular rules referred to were arts. 19, 21, 27, and 29. These are as follows: [The learned judge read these articles, already set out, and continued:—]

"The substance of the argument was, that although if the *Sans Pareil* had been navigating alone, having the tug and tow crossing her course from starboard to port, she should keep out of the way of the tug and tow, and they should keep their course and speed unless and until they might be compelled to take action, as contemplated by the note to art. 21, yet, that where the *Sans Pareil* was one of a fleet of warships steaming in company and crossing the course of the tug and tow, art. 27 applied, and art. 21 ought to have been departed from by the tug and tow, because, owing to the difficulties which the vessels composing the fleet would have in the circumstances in navigating for a tug and tow coming in amongst them and crossing their course, and in avoiding collision with one another, due regard was not had by those in charge of the tug and tow to the dangers of navigation and collision, and the special circumstances which it was contended rendered a departure from the rules necessary in order to avoid immediate danger.

"It was also contended that art. 29 applied for practically the same reason; but as this rule does not impose obligations, and merely provides that nothing in the rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to observe certain proper precautions, this contention was not really pressed . . . .

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"First, with regard to the law applicable to the case. The Regulations for Preventing Collisions at Sea, 1897, of which the articles above referred to form part, were made under an Order in Council in 1896 by virtue of s. 418 of the Merchant Shipping Act, 1894, which provides that regulations so made shall have effect as if enacted in that Act, and also applies them, together with the provisions of the Act relating thereto, or otherwise relating to collisions, to all foreign ships within British jurisdiction, and they and the provisions of the Act may, by s. 424, be applied by Order in Council to the ships of any country when beyond the limits of British jurisdiction, if the Government of such country is willing that they should be so applied; but s. 741 of the Act enacts that the Act 'shall not, except where specially provided, apply to ships belonging to Her Majesty,' and there is no special provision in the Act providing that the regulations made under it for preventing collisions at sea are to apply to such ships.

"There are, however, precisely similar regulations, made in June, 1899, for Her Majesty's ships by Order in Council, and these are set out in the Queen's Regulations and Admiralty instructions. These are not made by virtue of the Act of 1894, but they are, word for word, the same as those made under that Act; and there are, as I understand, only in addition certain special regulations for Her Majesty's ships with regard to certain special lights and signals to be used by them only. Art. 13 of the Regulations of 1897 contemplates such special regulations being made.

"The result is that, as the Regulations for Preventing Collisions at Sea (except the special regulations just referred to) are similar for Her Majesty's ships and for other vessels for all practical purposes, the navigation of all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels, must be conducted as if the same regulations applied to them.

"This is the only reasonable way to treat the matter. In my opinion, however, the fact that the regulations made with respect to Her Majesty's ships are not made under, and by virtue of, the Merchant Shipping Act, 1894, may, in cases of

collision between such a ship and a vessel to which the Regulations of 1897 apply, affect in some respects the statutory liability imposed on the latter vessel by s. 419, sub-s. 4, of the Act. This observation does not apply to most of the regulations which have to be obeyed—for instance, an infringement by the tug in this case of the rule with regard to lights would be visited by the statutory penalty, unless it could by no possibility have contributed to the collision. Such a breach is not affected by the observance or non-observance by the other vessel of the regulations applicable to her; but I find a difficulty in applying the statutory penalty in cases of collision between a merchant vessel and one of Her Majesty's ships, where the infringement by the former, which is complained of, is an infringement of art. 27 combined with art. 21. This arises from the language of these rules, and may be pointed out by dealing with the present case.

"In navigating for each other in the circumstances of this case, and acting on similar regulations, the *Sans Pareil* would have to keep out of the way (art. 19), and the *East Lothian* and her tug to keep their course and speed (art. 21), subject to the effect to be given to the note to art. 21 and to art. 27. It would be neglect of good seamanship and navigation to do otherwise, and if such neglect caused or contributed to the collision the vessel infringing the regulations would clearly be held to blame. If, however, a breach of art. 27, combined with art. 21, by the *East Lothian* and her tug did not in fact contribute to the collision, though by possibility it might have done so, then to fix the *East Lothian* with blame it is necessary to rely on the statutory penalty imposed by s. 419, sub-s. 4, of the Act of 1894, and to consider strictly whether any of the collision regulations referred to in that section have been infringed by her or her tug.

"Now, in my opinion, the collision regulations referred to in that section were only those made by virtue of the Act, which according to s. 418 are to have effect as if enacted in the Act, and, as already noticed, the Act does not apply to Her Majesty's ships.

"The *Sans Pareil* in fulfilling a duty to keep out of the way

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would, strictly speaking, be acting under art. 19 of the Queen's Regulations, and not under the corresponding article of the regulations made under the Act of 1894; and, strictly speaking, the duty of the *East Lothian* and her tug to keep their course and speed, according to art. 21 of the latter regulations, was only where by any of these rules the other vessel is to keep out of her way. 'Any of these rules' must, as a matter of construction, mean any of the regulations made under the Act of 1894, and art. 27 thereof only strictly applies to the obeying and construing of the same rules.

"It appears to me necessarily to follow that the statutory provisions of s. 419, sub-s. 4, could not apply in the present case, even if the *East Lothian* and her tug did not act in accordance with art. 27.

"There was a further point taken by the plaintiff with regard to the meaning of art. 27 of the Regulations of 1897. It is this—that that article does not impose an obligation which can be infringed, but is to be considered solely as in exoneration of the strict duties imposed by the other articles.

"I am not able to agree with this view entirely. It seems to me that there is an express obligation in obeying and construing the rules to use due regard to the circumstances mentioned in the article. At the same time, it is difficult to conceive a case in which there could be a finding of want of such due regard unless it in fact contributed to a collision. So that I fail to see how there can be an infringement of art. 27, unless there has been default under it which contributes to a collision.

"For these reasons I am of opinion that, in order to establish liability on the part of the plaintiff for the collision in this case, it is necessary to shew that there has been default on the part of the *East Lothian* or her tug under arts. 21 and 27 which in fact contributed to the collision.

"Even if the tug and tow were wrong in the circumstances in keeping their course and speed, it is clear that the *Sans Pareil* could by the exercise of reasonable care have avoided the collision without any difficulty, and, according to well-known legal principles, the plaintiff can, therefore, recover.

"I might leave the case there, but I think it desirable to

express the view which the Court has arrived at with regard to the important question as to whether the tug and tow were right or wrong as a matter of navigation, having regard to the terms of art. 27, in proceeding on as they did in the circumstances.

"The argument of the Attorney-General upon this point was supported by a reference to a notice issued by the Board of Trade, drawing the attention of shipowners and masters to the danger caused by single ships approaching a squadron of war-ships (1), though the masters of the tug and tow stated that they were not aware of the existence of this notice. The Attorney-General did not rely upon it as having any binding effect like the regulations, but as supporting his contention that for a single ship to stand on in amongst a squadron was for her to run into such danger that she should be held guilty of an infringement of art. 27.

"There may possibly be cases in which if a vessel were to keep her course and speed through a squadron of war vessels, which ought primâ facie to keep out of her way, it would be impossible or impracticable for them to manœuvre so as to keep out of her way without some or one of them either colliding with her or with some other vessel or vessels of the squadron, and in such cases the single vessel may be required to take action to avoid the danger, either by acting according to the note to art. 21 or in accordance with the provisions of art. 27; but there is at present no regulation dealing in express terms with the case of a single ship approaching a squadron of war vessels.

"The general regulation for all crossing steam-vessels is that the vessel which has the other on her starboard hand must

(1) Notice to shipowners and masters, issued by the Marine Department, Board of Trade, April, 1897.

"Single ships approaching squadrons.

"The Board of Trade desire to call the attention of shipowners and masters to the danger to all concerned which is caused by single vessels approaching a squadron of war-ships so closely as to involve risk of collision, or attempting to pass ahead of, or through, or to break the line of, such squadrons. The Board find it necessary to warn mariners that on such occasions it would be in the interests of safety for single ships to adopt timely measures to keep out of the way of, and avoid passing through, a squadron."

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keep out of the way of the other, and that other must keep her course and speed, unless the circumstances referred to in the note to art. 21 and in art. 27 require her to act differently. It is, therefore, necessary to consider the particular circumstances, and I have taken the opinion of the Elder Brethren upon the point, having regard to the facts of this case. Their opinion is that the position and movements of the fleet did not constitute such a danger of navigation or collision, or such circumstances as to render it necessary for the tug and tow to wait till the fleet had passed, or to starboard and go under the stern of the fleet; in other words, they do not consider that the tug and tow acted improperly in this case in proceeding as they did, and that the *Sans Pareil* and the other vessels of the fleet could without difficulty or danger, though possibly not without some inconvenience, have avoided them. . . . .

"For these reasons I am of opinion that the plaintiff is entitled to judgment."

The defendant appealed on the ground that the *East Lothian* was, in the circumstances, also to blame for not complying with art. 27.

May 16, 17. *Sir R. B. Finlay*, *A.-G.*, and *Acland*, for the appellant (defendant). Due weight was not attached in the Court below to the meaning and effect of art. 27 of the Regulations for Preventing Collisions at Sea. The *East Lothian* ought not to have kept her course and speed under art. 21, for those in charge of her should have had regard, as required by art. 27, "to all dangers of navigation and collision, and to any special circumstances which may render a departure from"—in this case art. 21—"necessary in order to avoid immediate danger"—in other words, those in charge of the *East Lothian* ought not to have attempted to cross ahead of the *Sans Pareil*, but should have regarded the fleet as a "special circumstance," and "to avoid immediate danger" have kept out of the way.

By art. 29 the rules will not exonerate any vessel under any circumstances from the consequences of the neglect of proper precautions "required by the ordinary practice of seamen," and

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under this rule it was an obvious seamanlike precaution for the tug and tow not to approach the warships steaming in company, but, as suggested by the notice issued by the Board of Trade, have adopted timely measures to keep out of the way, which could have been done by easing or slightly starboarding.

For the breach of arts. 27 and 29 the *East Lothian* must "be deemed to be in fault" within the meaning of s. 419, sub-s. 4, of the Merchant Shipping Act, 1894.

Joseph Walton, Q.C., Scrutton, and *Mackinnon,* for the respondent (plaintiff). There are no regulations throwing any duty upon single ships approaching warships steaming in company, for the notice issued by the Board of Trade is not to be construed into a rule of navigation followed by a statutory penalty. In the position in which the *Sans Pareil* and the *East Lothian* were towards one another, the International Regulations for the Prevention of Collisions at Sea have prescribed definite and correlative duties upon the two vessels. By art. 19, "when two steam-vessels"—in this case the *Sans Pareil* and the *East Lothian* in tow of the tug—"are crossing so as to involve risk of collision, the vessel"—that is, the *Sans Pareil*—"which has the other on her own starboard side shall keep out of the way"; and by art. 21, "the other"—that is, the *East Lothian,* "shall keep her course and speed"; but, assuming that the *East Lothian* ought to have regarded the fleet as a "special circumstance," within the meaning of art. 27, and departed from art. 21 by herself keeping out of the way, the words prefixed to arts. 21 and 27, "where by any of these rules" and "in obeying and construing these rules," withdraw from the rules, in this case, the statutory penalty entailed by s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, in the event of an infringement of "any of the collision regulations," for, as pointed out by the learned judge in the Court below, the *East Lothian* in keeping her course and speed under art. 21 was obeying a rule of seamanship, which would only have a statutory effect if the other vessel was bound by the same rules to keep out of the way; but the defendant, as navigating officer of the *Sans Pareil,* was acting under the Queen's Regulations, which, though identical in terms, are not

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statutory, owing to the exemption by s. 741 of the Merchant Shipping Act, 1894, of Her Majesty's ships from the provisions of the Act.

It is also to be observed that art. 27, which, it is alleged, on behalf of the defendant, the *East Lothian* disregarded, requires a departure from the rules in special circumstances, but leaves the mariner to do in such circumstances what is best as a matter of seamanship, so that non-compliance with art. 27 does not amount to a breach of an affirmative statutory obligation to take a particular step. Similar remarks apply to art. 29, which only refers to the precautions required by the ordinary practice of seamen. The consequence is that, even assuming the *East Lothian* to have been in the wrong for being where she was, she cannot "be deemed to be in fault" under s. 419, sub-s. 4, and the question resolves itself into one of negligence at common law.

It was admitted in the Court below by the Attorney-General that the defendant negligently omitted to notice the lights indicating that the *East Lothian* was in tow of the tug, and it is clear that all he had to do to avoid the collision was to keep his port helm a little longer—in other words, assuming that the *East Lothian* ought not to have been where she was, still the plaintiff can recover, for the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened: *Radley* v. *London and North Western Ry. Co.* (1)

This common law doctrine was applied in Admiralty in the case of *The Margaret* (*Cayzer* v. *Carron Co.*) (2), where it was held that, assuming the plaintiffs' vessel had transgressed the rule—in that case a Thames rule not coming under the provisions of the Merchant Shipping Act—yet such transgression was not the cause of the accident, for ordinary care on the part of the defendants' vessel would have enabled her to avoid the collision, and, therefore, she alone was to blame.

The Attorney-General, in reply. The respondent seeks to concentrate attention on one vessel of the fleet; but the fleet was an organised unit under one command, and art. 21 of the

(1) (1876) 1 App. Cas. 754. (2) 9 App. Cas. 873.

Regulations for Preventing Collisions at Sea, which deals with single ships on crossing courses, did not apply. Arts. 27 and 29 applied, and, as the fleet was proceeding at a speed of ten knots, and was seen by the tug and tow broad on their port bow six miles off, starboarding one point would have carried the tug and tow astern of the fleet—that is, the *East Lothian*, by a slight deviation, with no inconvenience to herself or her tug, could have avoided any danger of collision. Those in charge of the *East Lothian*, therefore, committed a breach of a regulation involving a statutory liability; but if the accident is to be treated as resulting from negligence at common law, the *East Lothian* is to blame, for, as a matter of seamanship, no prudent mariner would have approached the fleet so closely as to involve risk of collision, or attempted to pass ahead of, or through, or break the line of warships steaming in company. The tug and tow, therefore, ought not to have been where they were at all, and for this negligence the respondent is liable—that is to say, the efficient cause of the collision was the combined negligence of those in charge of the *East Lothian* and the defendant in charge of H.M.S. *Sans Pareil*. The action of the tug and tow in throwing themselves across the path of the fleet was a continuing negligent act which in part caused the accident. They placed the appellant in a difficulty in which it is admitted that he acted wrongly by not keeping his port helm a little longer. The result is that, applying Admiralty law to the joint negligence, the *East Lothian* is also to blame, and it follows that the damage sustained should be divided.

[Pollock on Torts, 5th ed. pp. 438, 439, was referred to.]

A. L. Smith L.J. This is an action brought by the owner of the merchant ship *East Lothian* against the navigating lieutenant of H.M.S. *Sans Pareil*. The facts are not in dispute. The *East Lothian* was going from Nantes to Cardiff, and was proceeding in a northerly direction in tow of a tug. Both tug and tow had all their lights burning properly, and the tug had two white lights, one above the other, at the regulation distance, which shewed that she had another vessel in tow. The fleet of warships—which was proceeding to the eastward

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up Channel in four lines at a speed of ten knots an hour—was on the port side of the *East Lothian*—that is to the westward—and was seen at a distance of about six miles. All the vessels in the fleet had their lights up. The *East Lothian* and her tug kept their course and maintained their speed, which was about six knots an hour. The *East Lothian* and her tug crossed ahead of the *Europa*, the leading ship of the southernmost line of cruisers, and when the tug and tow reached the line of battleships—which was three-quarters of a mile off the southernmost line of cruisers, each of the four lines being three-quarters of a mile apart, and each vessel following the other at a distance of about 400 yards—the navigating lieutenant of the *Sans Pareil*, which was the leading battleship, ported his helm to go astern of the tug, but assuming that the tug had nothing behind it, when in reality it had the *East Lothian*, he then starboarded his helm to get back into line, and so rammed the *East Lothian*, with the result that she sank and one life was lost. It is admitted that this was negligence, and in the Court below the *Sans Pareil* was held solely to blame.

It is now urged by the Attorney-General that the *East Lothian* is also to blame, and the proposition contended for by him really amounts to this—that a squadron of Her Majesty's ships proceeding in the formation I have described, and occupying about two square miles of water, has a right to the road, and that it is the duty of Her Majesty's subjects and of everybody else to get out of the way; but I cannot find any regulation, or Act of Parliament, or rule of law which will support that proposition, and it seems to me that when Her Majesty's ships are navigating in waters like this they must observe the principles of good navigation just like any other of Her Majesty's subjects, and must obey the rules of the road.

With regard to the rules, s. 418 of the Merchant Shipping Act, 1894, enacts that, "Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council make regulations for the prevention of collisions at sea"—these are the regulations which bind merchant ships, British and foreign—"and may thereby regulate the

lights to be carried and exhibited, the fog-signals to be carried and used, and the steering and sailing rules to be observed, by ships, and these regulations shall have effect as if enacted in this Act." By s. 741, "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty." It therefore seems that the regulations made under the Act of 1894, and the statutory provisions relating thereto, have no application to Her Majesty's ships; but, two years after the date of what I will call the statutory regulations, Her Majesty made similar regulations for the guidance of naval officers, which, however, have no vitality given to them by statute.

The first of the statutory regulations applying to the circumstances of this case is the crossing rule embodied in arts. 19 and 21. Under these rules the *Sans Pareil* would have to keep out of the way, and the *East Lothian* and her tug to keep their course and speed; but, as pointed out by Gorell Barnes J., this only applies where the rules apply to both crossing ships, and art. 19 did not apply to the *Sans Pareil*, though the rules of good seamanship would suggest carrying them out with the modification, if the circumstances required it, indicated in the note to art. 21.

It is, however, contended by the Attorney-General that although, primâ facie, a crossing vessel should keep her course and speed, the special circumstances were such that the *East Lothian* should not have done so, but should, under arts. 27 and 29, have departed from art. 21. [The learned judge read arts. 27 and 29, already set out.]

The first point to be determined is, therefore, whether the *East Lothian*, in keeping on as she did and crossing the bows of the *Europa* and *Sans Pareil*, infringed a statutory regulation, so that she is to "be deemed to be in fault," and consequently jointly liable with the *Sans Pareil*; though if the *East Lothian* has not been guilty of a breach of a statutory regulation, but only of negligence, then the right of action which the merchantman has against Her Majesty's ship would be an action at common law for negligence, and the doctrine of contributory negligence would apply. The first question therefore is, Was

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the learned judge in the Court below right in saying that, "It appears to me necessarily to follow that the statutory provisions of s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, could not apply in the present case, even if the *East Lothian* and her tug did not act in accordance with art. 27"? He says in effect that the case does not come within the statutory rule, but only within the rules relating to good seamanship. I agree with him on that point. The words of s. 419, sub-s. 4, are: "Where in a case of collision it is proved to the Court, before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

I do not think the *East Lothian* has broken a statutory regulation, because these regulations do not apply; but has the *East Lothian* been guilty of any breach of the collision regulations? It seems to me that the regulations contemplate a departure from them if there are special circumstances necessitating it, and in that case the regulations are no longer to be observed, but the master is left to do what, according to the best of his knowledge, is the course of good seamanship. That is not a regulation in any shape. When a man is called upon to do his best because the collision regulations cannot be carried out, there cannot be a breach of the regulations within s. 419 of the Merchant Shipping Act, 1894. The regulations are done with and departed from, and I think, therefore, that arts. 27 and 29 are not to be held to be collision regulations.

I am, therefore, of opinion that the *East Lothian* cannot be held to be in fault under the statute, and the result is that the cause of action by the merchantman against the *Sans Pareil* is really for negligence. Now, it was admitted in the Court below that the *Sans Pareil* was to blame; but it is contended that the merchant ship was also guilty of negligence, and therefore cannot recover. On this point we have asked our nautical assessors this question: "Was the *East Lothian* under the circumstances of this case guilty of negligence in passing across

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the bows of the *Sans Pareil*?" The answer is, "It was improper navigation," which I take to mean that our assessors do not advise us in the same way as the Elder Brethren advised the learned judge in the Court below, and I agree in the advice which is now given to us.

I think our assessors are right, and, in the exercise of my own opinion, I think it was an improper act of navigation for the *East Lothian* to continue her course and speed, in the circumstances of the case, and to persist in going across the fleet, which those in charge of her saw coming up on her port side six miles off. The Attorney-General has pointed out that the tug and tow by starboarding, and so making a slight deviation, would have avoided all danger of collision. Instead of that, they go across the bows of the leading ships of the fleet, with the result that the *East Lothian* was rammed by the *Sans Pareil*.

The well-known law of contributory negligence laid down by Lord Penzance in the House of Lords in *Radley* v. *London and North Western Ry. Co.* (1) is "that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident"; but there is this "qualification, equally well established . . . . namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The case of *The Margaret* (2) shews that the common law doctrine is applicable to such a case as that now before us.

The question, therefore, is whether on the facts of this case the navigating lieutenant on board H.M.S. *Sans Pareil* could, by the exercise of ordinary care and diligence, have avoided the mischief which happened. It seems clear that he could. He saw the tug crossing his bows, and he rightly ported so as to go astern of her; but he negligently failed to see the tow

(1) 1 App. Cas. 754. (2) *Cayzer* v. *Carron Co.*, 9 App. Cas. 873.

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although she had all her lights burning, and then he did the act which brought about the collision. He starboarded back again. If he had only kept his helm a-port for a very short time, that is, if he had seen, as he ought to have seen, that there was a tow behind the tug, and kept his helm a-port a very short time longer, he would have gone astern of the tow. He, however, put his helm a-starboard to get back into the line. There was nothing in the position of the fleet on either side or behind him to hamper his movements, and, with regard to this part of the case, the *Sans Pareil* may be regarded as alone because the vessel on the starboard side was three-quarters of a mile off, and the vessel astern 400 yards off. If he had been hampered by the fleet, other considerations might have arisen which do not arise in this case. The negligence of which he was guilty was in starboarding back again without seeing the *East Lothian*.

It cannot, therefore, be said that in these circumstances the navigating lieutenant of H.M.S. *Sans Pareil* could not by the exercise of ordinary care and skill have avoided the collision. For these reasons I am of opinion that this appeal must be dismissed.

VAUGHAN WILLIAMS L.J. After the admission by the Attorney-General in the Court below that the defendant had been guilty of negligence in starboarding back into line before the *East Lothian* had passed clear, this case resolved itself into a simple question of the application of well-known principles of common law and Admiralty law; but, before dealing with that law, I wish shortly to state my view on the point which has been argued at considerable length, namely, the application of the ordinary rules of navigation to Her Majesty's ships.

I do not assent to the proposition that Her Majesty's ships of war, proceeding as a fleet, are governed by the same rules as other ships, for if Her Majesty's ships were held in such circumstances to be governed by the ordinary regulations, it seems to me that extreme danger would result, not only to such ships as the fleet should happen to meet in its course, but to

the men-of-war in the fleet inter se. It seems to me that under those special circumstances the ordinary rules of navigation and the ordinary rules for the prevention of collisions at sea do not apply, not because there is any special favour or exemption to Her Majesty's ships of war, but because when they are steaming in company, as they have a perfect right to do, a special set of circumstances arises which make it dangerous and bad seamanship to apply the ordinary regulations.

The advice which we have received from our nautical assessors seems to me to be based upon this view. They tell us that it was improper navigation for the tug and tow to pass under the bows of the ships of the squadron, and to my mind it is quite clear that that was so.

The two questions we have to consider here are—first, whether there was an infringement of a rule of navigation by the tug and her tow, which for this purpose must be considered as one ship; and, secondly, whether if there was no such infringement, was there under the circumstances such contributory negligence by the tug and tow as would prevent the plaintiff recovering in this case.

With regard to art. 27, requiring a departure from art. 21, if the circumstances demand it, I should hesitate to assent to the proposition that, because you meet a ship not bound by the regulations, therefore the regulations do not bind the British ship, because the very fact that you meet a foreign ship —and happen to know that it is a foreign ship, and that it is a ship of such a character that it must not be assumed to be likely to follow the regulations—may be a very good reason for departure from the regulations. It seems to me that it is by no means accurate to say from that that the regulations do not apply. The only thing that can be said is that the circumstances are special circumstances which justify a departure by the British ship from the regulations. That being so, according to my judgment, we ought, notwithstanding the fact that the regulations which are made under the Merchant Shipping Act do not apply to Her Majesty's ships of war, to look and see whether there has been any breach of the regulations by the plaintiff ship.

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It is not contended on behalf of the defendant that there has been any breach of art. 21, because it is justly said that the circumstances of this case were such that art. 21 could not be insisted on, the special circumstances not only warranting but necessitating a departure from that article. The question is whether there has been any breach of arts. 27 and 29; and I feel the force of the argument which has been addressed to us, that the words in art. 27, "Regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary," go to shew that directly you have such circumstances as justify a departure from the rules, in one sense at all events, it can no longer be said that those rules from which you may depart are obligatory. It seems to me, however, that that does not quite dispose of the question of the rules, because on the facts here it would seem that the *East Lothian* and her tug refused to depart from the rules, notwithstanding the special circumstances which rendered it necessary to depart from them, in order to avoid immediate danger. The *East Lothian* and her tug persisted in obeying a rule which, if they had met another vessel under ordinary circumstances, would have justified them in keeping their course and speed, although there were special circumstances which rendered departure from the rule necessary in order to avoid immediate danger. I am not sure that that might not be a case of an infringement of the rule within the meaning of s. 419 of the Merchant Shipping Act, 1894. The importance of this point is that, if you once get an infringement of such a rule, proof of the infringement is sufficient to make it necessary to deem the ship guilty of the infringement in fault, and so to deem it in fault, notwithstanding the fact that the particular infringement may not have brought about the collision. Under the circumstances, without saying that it is impossible that it should be a breach of the rules, particularly of art. 27, for a vessel to insist upon going on abiding by the express rules notwithstanding the special circumstances, I am not prepared to say that in this particular case it was.

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The only remaining question is whether, applying the common law rules to this matter, there is evidence of such a state of circumstances that the plaintiff is disentitled to recover. That there was negligence by the plaintiff there can be, to my mind, no doubt. If the advice of our assessors is right, there obviously was, and, speaking for myself, I entirely agree with the view they take. But, according to the rule laid down in *Radley* v. *London and North Western Ry. Co.* (1), that is not sufficient; you must shew that the negligence was of such a character that the defendant could not with ordinary skill and care have avoided the accident. That rule applies equally in the Court of Admiralty, where the practice is that if both ships are to blame the damage is to be divided: see *The Margaret.* (2) In that case Lord Blackburn and Lord Watson make it clear that the common law principle governs the Admiralty rule. Lord Blackburn says: "I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule"—they were dealing with a Thames rule, which was not under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894—"was in itself sufficient unless it was an occasion of the accident." He therefore assumes that the principle of *Radley* v. *London and North Western Ry. Co.* (1) applies; and Lord Watson says: "the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret.*" He therefore again assumes that, if the consequences of the neglect of the plaintiffs could have been avoided by ordinary care and prudence on the part of the defendants, the negligence of the plaintiffs would be no answer to the action. The rules which are laid down by Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (3) are really rules of evidence and not rules of law; but it all comes back to the common law rule, that the plaintiff must prove the negligence of the defendant to have been the cause of the accident. Applying the rule to this case, and taking into

(1) 1 App. Cas. 754. (2) *Cayzer* v. *Carron Co.*, 9 App. Cas. 873.
(3) 1 App. Cas. 754, at p. 759.

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consideration the admission of the Attorney-General that the cause of the accident was the mistake of the navigating lieutenant, what does it come to? It seems to me impossible for us to go into the question whether that which the navigating lieutenant did was or was not inconsistent with the exercise of ordinary care and prudence on his part. But for that admission, I should have been very far from thinking that it was perfectly clear that the consequences of the improper navigation of the tug and tow could have been avoided by ordinary care and skill on his part. It is not the rule that those who have to meet the negligence of the plaintiff have to act up to counsels of perfection. The very words of the rule, "ordinary care and prudence," assume a margin of deviation from counsels of perfection, and I should require to consider some time before I came to the conclusion that, having regard to the short space of time that elapsed and the difficult circumstances in which the navigating lieutenant was placed by the misconduct of the tug and tow, the consequences of their misconduct could have been avoided by ordinary care and prudence on his part.

ROMER L.J. The first question to be considered, and the only question in the case of real general importance, is whether the *East Lothian* and her tug were justified in trying to cross in front of the Channel squadron.

In the Court below the Elder Brethren advised the learned judge that, "The position and movements of the fleet did not constitute such a danger of navigation or collision, or such circumstances as to render it necessary for the tug and tow to wait till the fleet had passed, or to starboard and go under the stern of the fleet;" in other words, they did not "consider that the tug and tow acted improperly in this case in proceeding as they did."

I entirely disagree with that view. I think that, in the circumstances, the tug and tow were not justified under art. 21 of the Regulations for Preventing Collisions at Sea or otherwise in attempting as they did to pass in front of the Channel fleet. The special circumstances of the case, to my mind,

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ought to have negatived to the tug and tow any such idea. The position was this. The whole fleet was coming up Channel in four columns, each column consisting of several ships. In that formation it is of the utmost importance that perfect order should be preserved, for to become disorganised would be to run the risk of disaster. It cannot be disputed that the Channel fleet had a right to come up Channel in that formation. On the other hand, the fleet had no special right beyond that which all ships have, but it cannot be said that in coming up in that formation, and in the way they did, the Channel fleet was acting improperly. The fleet had no right to assume that its path up the Channel would be left perfectly clear; still less had it a right to assume that it could go up Channel without keeping a good look-out and not be guilty of negligence. No such right is claimed on the part of the Crown; but on coming up with the fleet what, under the circumstances, ought the tug and tow to have done? They proposed to keep a course which would just clear the first column of cruisers, which would just bring them, if the squadron did not stop, in front of the leading ship of the second column, which would carry them into the centre of the third column, and if they escaped these battleships would carry them into about the centre of the fourth column. What must have been the probable or possible result of such conduct? A great danger was cast upon the Channel fleet in having its columns broken in such a way, with the difficulty of suddenly stopping ships of that huge build and weight and interfering with their course. Let us assume that the second column might have avoided a collision, what would have happened to the third column? If the tug and tow had persisted in their course, that column must have been wholly disorganised. It appears to me that if the case had been that of a single steamship, prudence dictated that that vessel should not attempt to cross in front of the squadron; but it was still less prudent or proper, in my opinion, on the part of a tug towing a ship with a rope a cable in length. It was not reasonable for the tug and tow to expect the whole Channel squadron to manœuvre so as to try and escape from the difficulty and danger in which it was

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placed, nor were the tug and tow entitled to expect that the fleet would alter its course and formation simply to avoid them. The tug and tow, however, did proceed to cross, and the fleet was bound to keep a good look-out, not be guilty of negligence, and do all it could to avoid disaster. It is true that, though the tug and tow improperly crossed the line of the fleet, every accident that might subsequently ensue, directly caused by the negligence of one of Her Majesty's ships, would not be held to have been contributed to by the initial error of the tug and tow in crossing the line; but the question where the line of demarcation is to be drawn is difficult.

I think, as at present advised, that though some negligence on the part of one or more of the vessels of the fleet were proved, yet if the accident had really arisen from the formation of the fleet, the case should be dealt with as one of contributory negligence; but, in the special facts of this case, it appears to me that, except remotely, the accident had really nothing to do with that difficulty. It arose substantially by reason of the negligence of the navigating lieutenant on board the *Sans Pareil* in not seeing, or not properly interpreting, the lights on the tug, and in not observing that there was a ship in tow. Had it not been for that negligence of the navigating lieutenant, the accident could easily have been avoided. The *Sans Pareil* could have been kept under the port helm a little longer, and so avoided both tug and tow without difficulty or danger to the fleet, either as a column or as individual ships in each column. The truth is that this accident was brought about by the negligence of the navigating lieutenant of the *Sans Pareil*, just as if that vessel had been by itself. The accident had nothing to do with the fleet, and resulted from the negligence of a particular ship and, so far as appears, would have happened if that vessel had been steaming by itself. Under these circumstances, it appears to me that the *Sans Pareil* cannot avail itself of the initial error of the tug and tow, and say the case is to be dealt with as one of joint or contributory negligence.

With reference to the contention, on behalf of the Crown, that the tug and tow are "to be deemed in fault" under s. 419,

sub-s. 4, of the Merchant Shipping Act, 1894, because they infringed some of the collision regulations, as the point is of some importance in a legal sense, I wish to add, that the only regulations which the tug and tow can be suggested to have infringed are arts. 27 and 29; but art. 27 does not, in my opinion, create any regulations within the meaning of that section. The kind of regulation to which sub-s. 4 refers is indicated by the words used, namely: "The ship by which the regulation has been infringed shall be deemed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary." The last words seem to me significant, and it will be observed that so far as there are any express directions in art. 27 they are carefully limited. The article does say that due regard shall be had to all dangers of navigation and collision, but for all purposes it is limited by the words, "In obeying and construing these rules"; and, although it does say "Due regard shall be had to any special circumstances," it is only when they render "a departure from the above rules necessary."

In the case before the Court the question of construing this rule does not arise. The only question is whether rules 19 and 21 should be obeyed, for if you are to obey art. 27 you are to disregard rules 19 and 21. Art. 27 only states what you are to do as to obeying or not obeying the other rules. It contains no directions, and no rule in itself as to what you are to do when a departure from the rules is necessary. The parties are then left to the ordinary rules of good conduct and seamanship, and if those in charge of a vessel follow the statutory rules when they ought to disregard them, then they break such rules of good conduct and seamanship, and there is negligence; but, though there has been negligence, the party has not been guilty of a breach of the statutory collision regulations within the meaning of s. 419, sub-s. 4. Similar observations apply to art. 29, which does not contain any express rule or regulation. That article only prevents the other rules acting as exonerating the vessel under circumstances specified in the article. For these reasons it appears to me that the Crown is wrong in the

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contention that the tug and tow are to be treated as if they had been guilty of a breach of the statutory regulations, and so brought themselves under s. 419, sub-s. 4. That being so, the case remains to be dealt with on the footing of my first observation, and I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant (defendant): *Treasury Solicitor.*
Solicitors for respondent (plaintiff): *Thomas Cooper & Co.*

T. L. M.

1900
July 23.

IN THE GOODS OF SANDERS.

Administration—Intestacy—Colonial Grant—Re-sealing.

Where the executors of a will, under which a legacy of 250*l.* was payable to the "personal representatives" of the testator's brother, who died intestate domiciled in one of the Australian Colonies leaving no estate in this country, insisted on the re-sealing here of a grant of letters of administration which the brother's widow had obtained in the Colony,

The Court (Gorell Barnes J.) allowed the grant to be re-sealed.

FREDERICK SANDERS, late of 29, Pembury Road, Lower Clapton, in the county of Middlesex, by his will, dated January 30, 1896, bequeathed to his brother, Henry Joseph Sanders, the sum of 250*l.*; but if the latter should die in the lifetime of the testator, he bequeathed the said legacy to the "personal representatives" of his brother, to be administered as part of the latter's personal estate.

Henry Joseph Sanders died on August 22, 1897, at 17, Howe Crescent, Melbourne, intestate; and on October 18, 1899, letters of administration to his estate were granted by the Supreme Court of the Colony of Victoria, Australia, to Jane Sanders, of Melbourne, his widow. The intestate had resided for many years in the Colony of Victoria, and was domiciled there at the time of his death. He left no estate in this country.

Frederick Sanders died on February 27, 1899, leaving a will,

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probate of which was granted here to the executors therein named, and who had applied in the Principal Probate Registry for the Colonial grant obtained by H. J. Sanders' widow to be re-sealed, so that they might obtain a valid discharge for the 250*l.* bequeathed by the will of Frederick Sanders.

The testator's solicitors having written to the widow of H. J. Sanders, saying they were prepared to pay the legacy on production of letters of administration to her late husband's estate, her solicitor in Melbourne forwarded the grant made by the Colonial Court.

The solicitors for the executors thereupon had an interview at the Principal Probate Registry at Somerset House with the authorities, who expressed the opinion that the English Court had no jurisdiction, there being no estate here belonging to the intestate.

Priestley now moved to re-seal the Colonial grant.

THE COURT (Gorell Barnes J.) allowed this to be done.

Solicitors: *Sewell, Edwards & Nevill.*

H. D. G.

[DIVISIONAL COURT.]

1900
July 3.

COBB *v.* COBB.

Practice—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.* c. 39)—*Allowance for Wife—Husband's Earnings—Mode of Assessing Proportion to be allowed.*

In assessing the amount which a husband is to be ordered to pay for the support of his wife who has obtained a separation order against him under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), courts of summary jurisdiction are to be guided by the principles and practice upon which allotments of alimony are made in cases of judicial separation in the High Court.

THIS was a third appeal by the husband. The case on the second appeal is reported ante, p. 145.

The order now appealed from was made on May 23, 1900, after the appellant had been released from prison, where he had undergone a second term of imprisonment for non-payment of arrears.

The amount previously ordered was 1*l.* a week, and on May 23 the justices at Petersfield reduced this to 12*s.*

The husband now appealed against the order for 12*s.* a week, then made, upon the ground that this, too, was excessive.

It appeared that he was sixty-six years of age, and had been an outside porter at Addison Road Station for a great number of years; that his earnings were precarious and depended upon his health, but they averaged a little over 23*s.* per week. Being quite unable to pay the original amount ordered, namely, 20*s.* a week, he was sent to prison for a month. The arrears ran on. He was again committed to prison. The arrears again accumulated, and, when he was released after the second term of imprisonment, a subscription was raised by passengers and other sympathisers, and an application was made to the magistrates to reduce the allowance to a nominal amount. On this occasion witnesses were called to corroborate the husband's evidence as to his earnings. The wife was then

present, but not separately represented. The magistrate's clerk cross-examined the husband. The justices reduced the amount from 20*s.* to 12*s.*

On June 2 notice of appeal was given, but the wife was not represented and did not appear.

J. Ferguson Walker, for the appellant. There is nothing in the Act of 1895 to guide courts of summary jurisdiction as to the proportion they should allot for the support of complainants who obtain orders under the Act. In allotting alimony, this Court never exceeds one-half: *Haigh* v. *Haigh* (1); *Cooke* v. *Cooke* (2); and only goes so far in very exceptional cases. The usual proportion is one-third, and it is submitted that this would be reasonable in this and similar cases.

THE PRESIDENT (SIR F. H. JEUNE). I think the suggestion just made appears to be the right one, as to the mode in which courts of summary jurisdiction should exercise the wide discretion vested in them by the Act of 1895. I do not wish to lay down any hard and fast rule; but I think those courts may be well content to deal with questions of allowance on the principles, which, though not applied with absolute rigidity in this Division, are nevertheless generally recognised and accepted here as a practical guide in cases of judicial separation, the rule being that where there are no children of the marriage or where, if there are children, the wife has not to support them, she, if she has no means of her own, shall be allotted one-third of the husband's nett income, or, if she has means apart from her husband, then her income is to be made up to one-third of the joint incomes. I do not mean to say this is to be taken as a hard and fast rule, but I do not think that the case of *Haigh* v. *Haigh* (1) decided anything contrary to it.

Applying that rule to the particular case now before us, it is obvious that the justices have not made a sufficient reduction on the amount first ordered; and, so far from seeing in this case any circumstances which should lead the Court to award a larger proportion in favour of the wife, the facts tend rather

(1) (1869) L. R. 1 P. & M. 709. (2) (1812) 2 Phill. 40.

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The President.

in the contrary direction. It is competent for the wife to live in any place where she can live most cheaply; while the husband, on the other hand, is tied to the place where he has his occupation. He must live in London, and must also keep himself in full vigour in order to be able to do his work. I think that he puts his case very fairly when he says, through his counsel, that he ought not to pay more than 8*s.* a week for his wife's support, that being about one-third of his average weekly earnings. The appeal will, therefore, be allowed, and the order of the magistrates will be varied by substituting 8*s.* for 12*s.*

GORELL BARNES J. I agree.

Ferguson Walker asked that the new rate of payment now ordered should apply to the arrears which had not been wiped out by the husband's second term of imprisonment, the date of which was April 10, 1900.

GORELL BARNES J. You cannot, I think, go further back than the date of the application to reduce, which was May 23.

THE PRESIDENT. From that date the order will run at the rate of 8*s.* per week.

Solicitor: *R. Philip Upton.*

H. D. G.

LORD *v.* LORD AND LAMBERT.

1900
March 21.

Divorce—Damages—Married Woman—Knowledge of Co-respondent—Absence of Evidence—Direction to Jury.

Where in a petition by the husband for divorce on the ground of adultery claiming damages against the co-respondent, no evidence was given on behalf of the petitioner that the co-respondent knew that the respondent was a married woman:—

Held, that damages might, nevertheless, be assessed against the co-respondent.

The rules at common law in actions for crim. con. applied to claims for damages in divorce cases; and the direction of Tindal C.J. in *Calcraft* v. *Harborough (Earl of)*, (1831) 4 C. & P. 499, at p. 501, adopted and followed by Gorell Barnes J.

THIS was the petition of a husband praying for the dissolution of his marriage with the respondent, his wife, on the ground of her adultery with the co-respondent, Walter Lambert, against whom damages were claimed.

The respondent filed no answer.

Before the case was called on, counsel for the petitioner and co-respondent agreed the amount of damages at 100*l.*

The petitioner was married to the respondent in 1876, and they cohabited at Blackheath and other places. The petitioner was employed in the City of London in the office of an American merchant. He had been in that situation for thirty-six years, and was in receipt of a salary of 300*l.* a year. The respondent at the time of the marriage was possessed of no means of her own, but some time afterwards she came into property producing an income of between 500*l.* and 600*l.* a year. From that time they did not live so happily as theretofore. The respondent preferred going to theatres and music-halls, while the petitioner liked a quiet life. In the year 1895 they separated by mutual consent, the wife remaining in the occupation of the house, which was her property, and the husband going into rooms. In 1896 the petitioner received a letter from his wife, asking him to meet her. He did so, and she then informed him she was going to Jamaica for the benefit of her health.

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She subsequently sent him an address from Jamaica, and he forwarded some things to her at her request. He afterwards got another letter, saying she was going to New York; but he heard nothing further from her until, in the summer of 1899, he was informed that she had been seen at Blackheath. He afterwards saw her there with the co-respondent. He looked through a window of the house there, and saw her and the co-respondent dining together, and later on he pointed out the respondent to his solicitor as his wife. The co-respondent was with her. He was in the army, and a perfect stranger to the petitioner.

Evidence was then given by a maid-servant who had known the respondent for about fourteen years, and who proved that she was living with the co-respondent, and that they occupied the same bedroom in the house at Blackheath.

GORELL BARNES J., in summing up the case to the jury, said:—The adultery is proved and not disputed. Then comes the question of damages. The petitioner was married in 1876, and lived for a long time happily with his wife; but after she came into her money she was not content to live quietly with him, and they separated. Still she continued his wife, and he is entitled to claim damages if his name is dishonoured by the co-respondent, who committed adultery with her. The damages are assessed, of course, on the ground of the wrong done to the petitioner. There are no children of the marriage, but you have this fact—that the respondent is a person of substantial means; and though she has chosen to utilise those means for herself, you cannot eliminate the consideration that she might have chosen, if nothing had gone wrong, to resume cohabitation with her husband, and he would then have the benefit of what she has. You must take these matters into consideration and see if you are satisfied with the amount agreed upon between counsel for the petitioner and co-respondent. One is always anxious that these matters should be fully disclosed to the jury. The petitioner did not seem anxious to tell us much about it. It was only when I told him that he was bound to answer the question I put to him as to what

position the co-respondent occupied that he told us who the co-respondent was. It is essential that the jury, who have to assess the damages, should be informed of all the circumstances.

Bargrave Deane, Q.C. (*Barnard* with him), for the co-respondent. It is a matter of grace on the part of the co-respondent to concede the damages. He is prepared to pay the 100*l.*, although there is no evidence that he knew the respondent to be a married woman.

W. H. Stevenson, for the petitioner, said he was not prepared to concede, as a point of law, that want of knowledge was a bar to damages being obtained. Ignorance of the fact that the respondent was a married woman would affect the measure of damages, but he was not aware of any authority for the proposition that, if a man committed adultery with a woman who was in fact a married woman, ignorance of the fact that she was a married woman would absolve him from any claim for damages. The injury to the petitioner was the same whether the co-respondent was aware of the fact or not.

[GORELL BARNES J. If it is a question of costs, the petitioner has to prove knowledge on the part of the co-respondent. Costs and damages are not, I think, on quite the same footing. My impression is that want of knowledge is not a bar to a claim for damages, but that it has a bearing on the quantum of damages. I am prepared to rule upon the case as it stands.]

Bargrave Deane, Q.C., for the co-respondent. The principle governing damages and costs is the same. It is clear law that if a co-respondent did not know, and is not proved to have known, that the respondent was a married woman, costs are never given against him for the reason that he has not committed a wilful wrong. The same rule should be applied as to damages. The co-respondent, in the absence of proof that he knew the respondent to be a married woman, has not been wilfully guilty of a wrong to the petitioner, and he ought not, therefore, to pay any damages. If the co-respondent stood on his strict rights, there should be no damages in this case, but he has agreed to pay 100*l.* on account of any expense which the petitioner has been put to which would not be allowed on taxation of costs.

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GORELL BARNES J. (to the jury):—Gentlemen, I do not think either of the learned counsel are quite right in their views. Mr. Stevenson, for the petitioner, contends that the burden of shewing that the co-respondent did not know that the respondent was a married woman rests on the co-respondent himself, but I do not think that is so. If a petitioner wishes to establish his claim to damages, on the footing that the co-respondent knew the respondent to be a married woman, the burden of proving that fact rests upon the petitioner. On the other hand, I do not agree that no damages can be recovered against the co-respondent if he did not know that the respondent was a married woman. I think a man who commits adultery with a woman takes that risk. As a matter of law (I have to lay this down without any great consideration) damages are recoverable though he did not know, because he takes the risk of the woman being married or not. But knowledge is an important element in assessing what amount of damages ought to be paid. If a man who commits adultery knows that the woman is a married woman, he knows that he is doing a wrongful act that has consequences to a particular person; but, if he knows nothing, and assumes that the woman is a single woman, then, although he is acting immorally, he is so acting with a woman who is allowing him to conclude that she is a single woman, and that he is not doing a wrong to any one else. I have authority for this proposition, which is sufficient for my purpose at present. In Mayne's Treatise on Damages, 1899, 6th ed. p. 513, a case is referred to, in which Tindal C.J. laid this down in addressing the jury (1): "You may consider, in estimating the damages, how far the plaintiff interfered to protect his wife from the temptations to which, by her profession, she was exposed. You may also consider whether the defendant knew that she was a married woman, or might conclude that she was still single, and attending as an actress at the theatre."

That was in the old days in common law, but the same rules apply now in claims brought here, and the ruling of the learned Chief Justice still applies.

(1) *Calcraft* v. *Harborough* (*Earl of*), 4 C. & P. 499, at p. 501.

In the present case there is no evidence that the co-respondent knew that the respondent was a married woman, and therefore you must treat the question on the basis that that evidence does not exist and has not been given. Therefore you ought to consider the case as if the claim was made where the co-respondent knew only that the person with whom he was committing adultery was a single woman. It was argued that he must have known. This may have been the case, but at any rate it was not proved; and of course there are plenty of cases where the woman is living as a widow, and the co-respondent may have taken up with her in that condition of things. But you must deal with it on the evidence before you: you cannot speculate as to it; and I will ask you to remember that, in arriving at a conclusion in this case.

The jury found that the co-respondent had committed adultery with the respondent, and assessed the damages at the sum of 100*l.*

THE COURT pronounced a decree nisi.

As to costs, no notice having been given to the respondent, an application to condemn her in costs stood over until after notice had been given.

As to the co-respondent,

W. H. Stevenson said that he was not in law entitled to ask for an order, the petitioner having no evidence as to the co-respondent's knowledge.

GORELL BARNES J. That is discretionary.

Bargrave Deane, Q.C., for the co-respondent, asked the Court not to give costs. The co-respondent was, in fact, prepared to pay them, but it was important that he should not have an order made against him.

GORELL BARNES J. The petitioner has not given the evidence, and therefore, unless there is something exceptional,

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there will be the usual result in such cases: no order as to costs.

Solicitors for petitioner: *Faithfull & Son.*

Solicitors for co-respondent: *Merriman, Pike & Merriman*

H. D. G.

1900

Aug. 7.

THE SIX SISTERS.

Admiralty—Collision—Barges in Tow—Thames By-laws, 1898, *r.* 11—*Anchor Ring Awash.*

The plaintiffs' and the defendants' barges, in tow of a tug in the river Thames, came into collision, owing to the defendants' barge being affected by the wind and tide whilst the tug was temporarily brought up, and the anchor hanging, ring awash, from the bows of the defendants' barge pierced the quarter of the plaintiffs' barge doing damage:—

Held, by Gorell Barnes J., that the plaintiffs were entitled to recover, for though, by rule 11 of the Thames By-laws, the anchor must be as low as ring awash, it may—according to the interpretation put upon the rule in *The J. R. Hinde*, [1892] P. 231—be as much lower as is thought proper, and those in charge of the defendants' barge were negligent in not having it sufficiently low in the water to avoid danger to other barges in case of contact in the course of the ordinary incidents of navigation in the river.

ACTION of damage by collision.

The plaintiffs were the owners of the barge *Jubilee* and her cargo. The defendants were the owners of the barge *Six Sisters.*

The case turned on the question of the proper mode for barges navigating in company to carry their anchors in view of rule 11 of the Thames By-laws. (1)

The facts were shortly as follows:—

(1) By-laws for the regulation of the navigation of the river Thames made by the Conservators, March 7, 1898, and confirmed by the Board of Trade, April 27, 1898.

Rule 11: "No vessel shall navigate or lie in the river with its anchor or anchors a cock bill nor with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the ring shall be awash except during such time as may be necessary for fishing or catting such anchor or anchors or for getting such vessel under way or for bringing up."

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On May 3, 1900, about 1.30 P.M. the *Jubilee*—an iron spritsail sailing barge of 37 tons register, two hands, and drawing 4 feet 6 inches, with a cargo of cement from Northfleet to Kingston-on-Thames—was lying with three other barges in tow of a steam tug off the entrance to the Surrey Commercial Docks in the river Thames. The craft were two abreast, the *Jubilee* being in the first rank on the starboard rope. Astern of her was the *Six Sisters*, a spritsail sailing barge of 35 tons register, and two hands, from Southend to Chelsea with a cargo of bricks. There was a strong westerly breeze and the tide was about half flood of the force in the stream of about two knots. The tug was head on stream, hanging to the dolphin, waiting in the slack tide for another barge which she was intending also to take in tow. The *Jubilee* was heading down the river, and the *Six Sisters*, which had tailed round under the influence of the wind and the eddy tide, ranged up, and, on the tug going ahead, after making the barge fast for which she had been waiting, the *Jubilee* scraped across the stem of the *Six Sisters*, and sustained damage by being pierced below the water line on her starboard quarter by the anchor hanging over the bows of the *Six Sisters* with the pea four feet under water.

The plaintiffs, the owners of the *Jubilee*, charged the *Six Sisters*, inter alia, with carrying her anchor in a dangerous and improper position, and contended that upon the true meaning of rule 11 of the Thames By-laws, as interpreted, with reference to the former rule 20, in *The J. R. Hinde* (1), the anchor, though it could not be higher than ring awash, ought to have been sufficiently low in the water to avoid danger to other barges in the event of contact whilst being towed in company. The defendants, the owners of the *Six Sisters*, alleged that her anchor was hanging in the usual and proper place with the ring awash in accordance with rule 11, and that the collision was the result of inevitable accident.

Laing, Q.C., and *Lauriston Batten*, for the plaintiffs, the owners of the barge *Jubilee*.

(1) [1892] P. 231.

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Aspinall, Q.C., and *D. Stephens*, for the defendants, the owners of the barge *Six Sisters*.

GORELL BARNES J. The only question is whether there was negligence on the part of those in charge of the *Six Sisters* in having the anchor carried in such a position that it could and was liable to prick the *Jubilee*. Now the rule bearing on this subject is No. 11 of the Thames By-laws. This rule has been interpreted in *The J. R. Hinde* (1), the only difference being that since that decision was given the rule has been altered, and requires the ring to be awash instead of the stock. That case decides that the anchor must be as low as stock awash, but may be as much lower as is thought proper.

It seems to me that the present case involves a question of nautical experience for the opinion of the Elder Brethren, and that the question is, whether having regard to the circumstances of the towage of several barges together, the barge which is complained of is in fault if the anchor is carried in such a position that it is liable to do damage to the other barges around it in the course of the ordinary incidents of navigation in the river, one of those incidents being that the barges may be brought up by the tug and get crowded or huddled together so that they are liable to touch.

In the opinion of the Elder Brethren, those in charge of the defendants' barge were in fault for having the anchor so high in the water as to be likely to do damage to other barges with which the barge was in company. The anchor of the *Six Sisters* was, it is true, ring awash, but that produced this result, that the pea of the anchor was four feet under water, and therefore not as much under water as the bottom of the barge *Jubilee*, and the Elder Brethren take the view that there was default in the circumstances in not having the anchor sufficiently low in the water to avoid doing damage to the other barges.

It seems to me to be a sound and sensible principle that if barges are navigating together their anchors should be placed sufficiently low so as not to be a source of danger to each

(1) [1892] P. 231.

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other, in case any contact takes place between them. This danger can be easily guarded against by lowering the anchor sufficiently—it does not require very much—to clear the bottoms of the barges. It has been contended that a difficulty would arise in attempting to carry this out, because there is no means of ascertaining to what extent the anchor must be lowered, as barges are not all of the same draught of water, but I do not feel impressed by any practical difficulty on that point, and, adopting the opinion of the Elder Brethren, I hold that the plaintiffs are entitled to recover.

Solicitors for plaintiffs: *Farlow & Jackson.*
Solicitors for defendants: *Holman, Birdwood & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

1900

July 23, 24; *Aug.* 8.

COWLEY *v.* COWLEY.

Married Woman—Dignity—Title of Honour—Incorporeal Hereditament—Marriage with a Peer of the Realm—Divorce—Former Wife marrying a Commoner—Continued use of Title derived from former Husband—Courtesy Title—Jactitation of Marriage—Injunction.

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.

A man has no such property in his name as to entitle him to prevent a woman, not his wife, claiming to be such, unless she does so maliciously.

Decision of Gorell Barnes J., ante, p. 118, reversed.

APPEAL by the petitioner, "Countess Cowley," from the decision of Gorell Barnes J. (1)

Lawson Walton, Q.C., and *Mark Romer*, for the appellant. First, the right to the use of a particular name does not confer

(1) Ante, p. 118.

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the sole right of user, or exclude another person from using it; secondly, there has been no infringement in fact of the respondent's name, "Earl Cowley"; thirdly, there must be some tortious act to constitute an infringement of an alleged right, and it is not a tortious act on the appellant's part to assume a name or title which has been conferred on her by the well-established convention or usage of society; and, fourthly, the present motion for injunction is a proceeding without precedent, there being no such proceeding known to the law as an action or motion to restrain a person from wearing arms or assuming a name.

Upon the first point, unless the patent conferring a name or title contains something positively excluding any other person from using it, the Court will not give the document an exclusive construction which its terms will not bear.

The name or title used by the appellant is merely a term of description which does not carry with it any real title: it is nothing more than a courtesy title given by the convention of society. Though she has not the legal right to bear a title, she falls into the category of ladies who are allowed by social convention to assume one. A dignity is a special kind of property, in the nature of real estate—an incorporeal hereditament: Cruise on Dignities, 2nd ed. (1823) pp. 99, 100; but the learned judge has gone too far in holding, as he seems to have done, that the appellant has been guilty of some trespass.

[COLLINS L.J. In Comyn's Dig. vol. iii. tit. "Dignity" (C. 6) it is stated that a wife who obtains a dignity by marriage "shall be noble for her life."]

That is to say, she retains her dignity notwithstanding her husband's death. It is difficult to see what difference there can be in this respect, whether the marriage is dissolved by death, or, as in the present case, by divorce on the ground of the husband's misconduct, which is a vital consideration in this case. The appellant does not dispute the law as laid down in the old authorities referred to by the learned judge—that if a woman who has acquired a dignity by marriage afterwards marries a commoner she loses her dignity and privileges, or

that, as it is said, "That which is gained by marriage may be lost by marriage": Cruise on Dignities, 2nd ed. ch. 3, s. 83, p. 90; Co. Litt. Lib. 1, c. 1, s. 7, 16 b; *Countess of Rutland's Case* (1); *Haward* v. *Duke of Suffolk* (2); but that is not sufficient to cover this case. Formerly, all dignities of the peerage were attached to property; but now a dignity or title of honour has become a personal honour conferred by letters patent from the Crown, as in the present instance, and is not necessarily connected with any estate, property, or territorial right. Here the grant is only of a dignity in connection with the family name, "Cowley." There is no grant of the "sole use" of the name, and the holder cannot object to the use of the name by another, though he might possibly have had the right to exclusive user if it had been attached to a particular estate, which, however, is not the case.

Upon the second point, even assuming the right to the name was exclusively granted to the Earl, the appellant has not been guilty of any infringement. The grant was of the right to use the name or title of "Earl Cowley," and she does not call herself by that name or title, and her use of the name "Cowley"—a name used by other members of the family besides the Earl, who have not interfered—cannot be restrained. The prefix "Countess" is merely a title given her by courtesy by her friends as having been the wife of the Earl; and no licence, consent, or permission is required for a courtesy title.

[LORD ALVERSTONE M.R. referred to *Rex* v. *Knollys*. (3)]

As to the third point, not only has there been no infringement of any right Lord Cowley possessed, but he does not suggest any actual injury whatever. If the name or title used by the appellant is merely a description, the Court has no jurisdiction to restrain its use, for the Court does not recognise the absolute or exclusive right to a name: *Du Boulay* v. *Du Boulay*. (4)

[LORD ALVERSTONE M.R. That was a case under the

(1) (1606) 6 Co. Rep. p. 360, 52 a.
(2) (1553) 1 Dyer, 79 b.
(3) (1694) Ld. Raym. 10.
(4) (1869) L. R. 2 P. C. 430, 441.

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French law. Suppose a man calls himself, for instance, the "Duke of Wellington," do you say that the Duke cannot bring an action to restrain him?]

The Crown might restrain him, but the Duke himself could not bring a civil action. There is no trace in the books of such an action ever having been brought. A man has a perfect right to assume any name he likes, whether it be a family patronymic or name of description. A courtesy title is nothing more than a name. There is a radical distinction between a dignity and a name: in the former there is a property, whereas in a name there is not. The usage of society is to be considered. For instance, it authorizes a commoner who marries a peer and after his death marries a commoner to retain the title she acquired by her first marriage: *Duchess of Suffolk's Case*. (1) And as a matter of fact ever since that case down to the present day the widow of a peer, on marrying a commoner, continues, by the etiquette of society, though not by legal right, to retain her title and precedence: Burke's Peerage, 1899, p. 1762; 1900, p. 1642. Dissolution of marriage by death makes no difference in the recognition by society of the widow's right to retain her late husband's name; neither does dissolution of marriage by divorce on the ground of the husband's misconduct. After divorce her married name remains, unless she acquires another name by repute: *Fendall* v. *Goldsmid*. (2) And it is the recognised practice among conveyancers to describe a divorced woman in a deed by her late husband's surname: Elphinstone and Clark's Introduction to Conveyancing, 5th ed. pp. 56–7.

Then as to the fourth point, to found an action for injunction to restrain the use of a name, some injury to or a violation of a right of property must be shewn: *Day* v. *Brownrigg*. (3) The Judicature Act has given the High Court no jurisdiction which it did not possess before: *North London Ry. Co.* v. *Great Northern Ry. Co.* (4) And the principles upon which the

(1) (1564) Leon. Pt. IV. p. 196; Dyer, fo. 79.

(2) (1877) 2 P. D. 263.

(3) (1878) 10 Ch. D. 294, 305.

(4) (1883) 11 Q. B. D. 30.

Court of Chancery has always acted in granting and withholding injunctions are stated in *Emperor of Austria* v. *Day and Kossuth.* (1)

[LORD ALVERSTONE M.R. referred to *Bonnard* v. *Perryman.* (2)]

Here there is no injury to any right of property either alleged or proved. The appellant is not doing any wrong: she is merely calling herself by a name by which her friends know her. The mere fact that Lord Cowley is annoyed by her using it is not sufficient ground for an injunction.

Bargrave Deane, Q.C., and *Willock*, for the respondent, Earl Cowley. It is admitted on behalf of the appellant that she has no legal right to the title "Countess Cowley," but reliance is placed upon the usage or etiquette of society. There is no instance to be found in which a married woman, after taking advantage of the Divorce Act to obtain a divorce from her husband, and thus by her own act destroying her status as a married woman, has asserted her right to use a title which she could only lawfully use as his wife. The name "Cowley" is taken from a place in the county of Meath from which the Cowley family originally came. The title is therefore not only connected with but is in the nature of real estate, and belongs exclusively to Lord Cowley. To import the usage of society into a case such as this, arising under the Divorce Act, is something entirely new. A usage of that kind cannot grow up into a law such as the Court will recognise. A usage cannot be created against the sanction of the person who is the existing representative of the royal prerogative: he is not bound by the fact that others bearing the same family name do not care to interfere. It is the duty of the person who holds the high position granted to him by the royal prerogative to resist any intrusion upon his legal right. *Emperor of Austria* v. *Day and Kossuth* (3) is an authority that the Court *will* restrain the unauthorized use of a name—that is, a name which is in the nature of real property. In *Day* v. *Brownrigg* (4) the name was that of a house, and the Court of Appeal

(1) (1861) 3 D. F. & J. 217, 238-9.
(2) [1891] 2 Ch. 269.
(3) 3 D. F. & J. 217.
(4) 10 Ch. D. 294.

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said that the plaintiff could call his house by any other name; but Earl Cowley could not call himself by any other name. The result of the authorities is merely this—that if there is no real ground of complaint the Court will not interfere. The true principle is that, even if no question of property is involved, where the only question is one of personal status, the Court *will* interfere: *Aslatt* v. *Corporation of Southampton*. (1) The fact that a woman who acquires a name or title by her marriage retains it after her husband's death does not apply to a woman who is divorced when her husband is still living, for in the latter case the retention of her former name or title is calculated to do him injury, whereas in the former case that cannot be so. The Court should regard only the strict legal right, and not any usage, etiquette, or old custom.

Lawson Walton, Q.C., in reply, referred, as to the jurisdiction of the Court to grant an injunction, to *Rigby* v. *Connol*. (2)

Cur. adv. vult.

Aug. 8. The judgment of the Court (Lord Alverstone M.R., Rigby and Collins L.JJ.) was delivered by

COLLINS L.J. We have come to the conclusion that the judgment of Gorell Barnes J. in this case cannot be supported. We agree entirely with the learned judge in his statement of the legal status of the two parties to this litigation. There can be no doubt whatever that Earl Cowley possesses in his title an incorporeal hereditament, and that the petitioner has no legal right to the designation "Countess Cowley." The authorities which the learned judge cites fully establish both propositions: see also *In re Sir J. Rivett-Carnac's Will*. (3) But it is here, as the learned judge himself felt, that the real difficulty begins. The application, as is pointed out in the judgment, was made by the respondent, Earl Cowley, in a divorce suit in which his marriage with the petitioner had been dissolved at her instance, and was originally placed on the ground of molestation, upon which it was impossible to support it, and it is admitted that

(1) (1880) 16 Ch. D. 143, 148. (2) (1880) 14 Ch. D. 482.
(3) (1885) 30 Ch. D. 136.

there is no element of malice in the case. The learned judge, however, dealt with it as though it were a proceeding instituted in the High Court invoking its general jurisdiction to restrain the commission of a legal wrong; and the question is, whether the Earl has established such a legal wrong committed against him by the lady who was his wife as to entitle him to the relief which he seeks against her. It is a remarkable thing that, if such a right exists, no precedent can be produced of such relief ever having been sought or obtained, though there must have been many instances where it was desired. The case is not even one of another person calling himself "Earl Cowley," as to which possibly different considerations might arise; and the right claimed by the Earl, which stands entirely outside the marital relation, must be put high enough to entitle him to enjoin any one from using without his consent any mere courtesy title derivable under his own—for instance, to restrain his mother, if she married a commoner, from continuing to call herself "Countess," or his daughter from calling herself "Lady." These, having no legal justification in either case, would, on the argument, be equally invasions of his right, which, put broadly, is to insist on all such persons being remitted to their strict legal position if without his consent they purport to hold titles as members of his family. In this view, and counsel did not shrink from it, it would be immaterial whether the title was one usually accorded by the courtesy of society or not. Indeed, pushed home to its logical consequences, it would seem to cover a claim to interfere with and restrain the use of a name expressly sanctioned by the Crown, as mentioned in the judgment of Gorell Barnes J. (1), and the affidavit of Sir A. W. Woods there referred to. It is strange that no such right has ever been enforced. We have been unable to find, and counsel were unable to point out, any analogous cause of action. The owners of franchises can maintain actions if such franchises are invaded—for instance, the owner of a market may complain of another being opened, but it must be shewn to be near enough, and held on such days, as to interfere with, and be "a nuisance" to, his own: see Comyn's Digest, "Market" (C. 2):

(1) Ante, p. 125.

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Collins L.J.

"Action upon the case for a nuisance" (A.). The owner of a freehold office, whose case seems to present the nearest analogy, might have maintained an assize for disseisin, or an action on the case for disturbance: see Comyn's Digest, "Assise" (B. 2): "Action upon the case for a disturbance" (A. 5); but it must have been an office of profit, and there must have been "disseisin" or "disturbance." The acts of the lady in this case fall far short of either the one or the other. Even if trespass could be maintained in respect of such a tenement, we do not think that the acts of the petitioner could by any latitude of expression be described as a "trespass." They at most amount to an assertion, which is true in fact, that she was at one time the wife of Lord Cowley. Sect. 57 of the Divorce Act (20 & 21 Vict. c. 85) provides that the parties shall be at liberty to marry again, as if the prior marriage had been dissolved by death.

Here the Earl's enjoyment of his hereditament is unaffected. He has suffered, so far as we can see, no injuria or damnum cognisable by law. The learned judge was of opinion that the fact that there was property in the title carried with it the right claimed, thus distinguishing it from the case of names in which there is no property. But, even if the property in the title could found a claim to enjoin any one else from assuming it without proof of other facts, as to which we give no opinion, the title assumed here is not identical, and Earl Cowley's remedy, if any, would seem to be by some form of action on the case, for which we can find no foundation in the facts here proved.

But we think the case does not rest merely on the negative evidence of absence of precedent. The existence of the cause of action for jactitation of marriage, and the conditions upon which alone it was maintainable, furnish an argument against the Earl. Though a person has in English law no property in his name, his status, whether married or single, is recognised by law, and carries with it certain rights and obligations; yet he could not complain if a woman who was not his wife claimed to be his wife, or enjoin her from so doing, unless she did it maliciously.

We are not, of course, dealing with a common law action of defamation, which might conceivably be supported by such facts. Peers were, no doubt, plaintiffs in suits for jactitation as often as other persons, yet, if the right here claimed existed, they had a much simpler remedy. Indeed, the case of *Lord Hawke* v. *Corri* (1) is a good illustration of this. There, in a suit brought by Lord Hawke for jactitation of marriage, the oppugnant called herself "Lady Hawke"; she set up a case of marriage which she, however, abandoned, and rested her defence on the fact that Lord Hawke had at one time consented to her bearing the title. This was held by Sir W. Scott to negative malice on her part, and the suit failed. The experienced counsel, arguing for Lord Hawke before Sir W. Scott, are reported to have said, in excusing their client for proceeding after his former conduct to the lady (2): "A suit for jactitation is the only remedy by which the party could protect himself and his family from such an assumption of a false relation to himself and to them." This is more than negative evidence. The suit for jactitation has itself fallen into disuse, and it seems late in the day to find a substitute for it in the case of titled persons. In the present case the lady has married again, but the right claimed by the Earl would, if allowed, be equally effective to restrain her, whether she had married again or not. It is not necessary to consider how far, if at all, social usage would support the lady in continuing to use the style Lady Cowley. The existence of such usage might be material in any proceeding where malice was part of the cause of action, but it seems irrelevant on the present inquiry. We are of opinion that the appeal must be allowed.

Appeal allowed.

[Leave was given to appeal to the House of Lords.]

Solicitors: *Lewis & Lewis*; *Wontner & Sons.*

(1) (1819, 1820) 2 Hagg. Con. 280.

(2) 2 Hagg. Con. 284.

G. I. F. C.

1900
Aug. 2.

[IN THE ARCHES COURT OF CANTERBURY.]
[APPEAL FROM THE CONSISTORY COURT OF EXETER.]

In re THE PARISH OF BIDEFORD.
Ex parte THE RECTOR AND CHURCHWARDENS AND CORPORATION OF BIDEFORD.

Ecclesiastical Law—Jurisdiction—Faculty—Grant of Faculty for use as Public Street of Portion of consecrated Cemetery or Churchyard closed for Burials, and setting back of Cemetery or Churchyard Wall—Retention of Cause.

The Ordinary has jurisdiction to grant a faculty authorizing a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector and churchwardens of a parish church in the diocese of Exeter, and the corporation of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the Ordinary for a faculty to authorize a strip of the cemetery being used for widening an adjoining public street, and the boundary wall of the cemetery being set back so as to form the boundary wall between the remaining portion of the cemetery and the widened street. It appeared that the street proposed to be widened was only 16 feet wide, and too narrow for the traffic along it, and that the proposed widening would be not only for the general convenience and safety of the public, but particularly of the rector and his parishioners, to the former of whom and the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corporation. It also appeared that the strip of the cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, and that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the Diocese of Exeter refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. The petitioners appealed to the Arches Court of Canterbury.

The Dean of Arches allowed the appeal, retained the cause, and, the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of the petitioners.

On October 17, 1899, a petition to lead to the grant of a faculty for the purpose of throwing a portion of the old church cemetery at Bideford, in the county of Devon and diocese of Exeter, into the adjacent public street known as Honestone

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Street, and the setting back of the boundary wall of the same cemetery so as to separate the ground proposed to be so thrown into the street from the remaining portion of the cemetery, was lodged in the registry of the Consistory Court of Exeter. (1)

The petition was signed by T. Newton Leeke, the rector, and H. M. Barclay and H. S. Bourne, the churchwardens of the parish of Bideford, and was also signed and sealed on behalf of and by the direction of the town council for the borough of Bideford, and contained averments material to this report to the following effect:—

"That your petitioners, the mayor, aldermen, and burgesses of Bideford (hereinafter referred to as the corporation), are desirous to carry out a much-needed improvement by widening Honestone Street, in the town of Bideford, and for this purpose to take and throw into the street a small portion of the old consecrated cemetery, containing 337 square feet or thereabouts, which adjoins and projects into the said street: a plan shewing the portion of the cemetery proposed to be taken for the improvement being annexed to the petition.

"That your petitioners, the corporation, are prepared to pay to the petitioners, the rector and churchwardens, the sum of 42*l.* as purchase-money for the portion of the cemetery proposed to be taken, and to erect a sufficient boundary wall of the same height as the present wall between Honestone Street and the remainder of the said cemetery.

"That it is proposed that such purchase-money shall be applied in repairing the cemetery walls and putting the cemetery in order under the direction of your petitioners, the rector and churchwardens.

"That the said cemetery has been closed for burials in new graves under an Order in Council. (2)

(1) The petition was addressed to "The Right Reverend Edward Henry, by Divine Permission Bishop of Exeter."

(2) The petition gave the date of the Order in Council in question as May 16, 1893. An Order in Council of that date (*London Gazette*, May 23, 1893, pp. 2994–5) in fact gave notice that an Order in Council would be made closing the cemetery. The actual Order closing the cemetery, with an exception as to certain burials, appears to have been made on July 4, 1893 (*London Gazette*, July 14, 1893 pp. 3978–9).

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"That there are in the portion of the cemetery proposed to be taken, as your petitioners believe, five graves only, the last interment therein having been made in the month of August, 1884, and two head-stones and no more; and these head-stones it is intended to replace in the remaining portion of the cemetery, and to there remove and reinter with the greatest care and decency any human remains which may be found in carrying out the improvement.

"That your petitioners are unable to discover the names of the persons interred in two of the above-mentioned graves, but the representatives of those interred in the three remaining graves are consenting to the said removal (except two persons, and they required each a payment of a sum of money before consenting).

"That the vestry of the parish had unanimously passed a resolution in favour of the proposed improvement, and authorizing the rector and churchwardens to apply for a faculty for sanctioning the same."

The petition concluded with a prayer for the grant of a faculty for the purposes aforesaid.

1899. March 17. On this day a member of the firm of solicitors for the petitioners, having previously received an intimation from the registrar of the Consistory Court of Exeter that the citation in the suit should be moved for in court, moved before the Chancellor of the Diocese of Exeter (Lewis Tonna Dibdin, Esq.), sitting in court in Lincoln's Inn (by consent), for citation to issue in the above matter on the petition of the rector and churchwardens and corporation of Bideford for a faculty as therein prayed.

An affidavit verifying the petition on behalf of the petitioners had been lodged in the registry of the Consistory Court of Exeter before the hearing of the motion.

THE CHANCELLOR. This is a motion for citation on a petition by the rector and churchwardens and corporation of Bideford asking for a faculty to allow a strip of a consecrated burial ground, in which there are several graves and one interment as late as

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1884, to be sold for 42*l.* to the corporation, in order that it may be thrown into and form part of a highway. The burial ground was closed some years ago under an Order in Council. Mr. Peard, the solicitor for the petitioners, appearing before me on their behalf, has stated that the street which is proposed to be widened is at present only 16 feet wide, and as it forms the main approach from one side of the town of Bideford to the market-place is far too narrow for the traffic which passes along it. I have no doubt that what Mr. Peard tells me is accurate, and subject to the amount of compensation being adequate, as to which there might be something said, and to the consents of those interested in the graves being obtained, which appears to have been done, I should, if I thought I had jurisdiction to grant the faculty, probably do so when the case came on for hearing. At any rate, there could be no doubt that I ought now to issue citation. But, in my opinion, it has long been decided by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg.* v. *Twiss* (1); *Harper* v. *Forbes.* (2) I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground.* (3) Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester* (4), in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances, I cannot but feel great diffidence in restating my opinion, and, were it not that the matter concerns my jurisdiction and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point was carried to the Court of Arches, and I hope this will be done in the present case. I have only to add, with reference to the agreement entered into by the corporation, that I cannot see that any power is conferred by the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Lands Clauses Acts to

(1) (1869) L. R. 4 Q. B. 407.
(2) (1859) 5 Jur. (N.S.) 275.
(3) [1895] P. 225.
(4) [1899] P. 19.

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enable consecrated land to be devoted to secular purposes. A Provisional Order, which when confirmed would have the effect of an Act of Parliament, would be sufficient; but in my view nothing less than express statutory authority will remove the protection which the law extends to lands once consecrated—a protection which, in the case especially of burial grounds, is surely in accordance with the desire of all of us—that the resting-places of the departed should not lightly, or except for some very great or urgent reason, be disturbed. I must refuse to issue citation in this case.

From the decree entered in pursuance of this judgment the petitioners appealed to the Arches Court of Canterbury.

The inhibition and citation in the appeal issued out of the registry of the Arches Court on June 19 last, and was subsequently duly served at Bideford.

1900. July 25. The appeal was heard before the Dean of Arches (Sir Arthur Charles).

H. D. Grazebrook, on behalf of the appellants, petitioners in the Court below. In refusing to issue the citation in this case, the judge of the Court below merely followed his own decision in *In re Plumstead Burial Ground* (1), where his reasons for declining jurisdiction and dissenting from the views of the Chancellors of the dioceses of London, Chichester, Lincoln, Llandaff, and Peterborough, all of whom have at various times granted faculties similar to that asked for by the petitioners—*The Vicar and Churchwardens of St. Botolph* v. *The Parishioners of the Same* (2); *The Vicar and Churchwardens of St. Andrew's, Hove* v. *Mawn and Others* (3); 2 Phillimore, Ecclesiastical Law, p. 1415; *The Vicar and Churchwardens of St. John, Cardiff* v. *The Parishioners of the Same* (4); *The Vicar and Churchwardens of St. Nicholas, Leicester* v. *Langton and Others* (5)—will be found set forth at greater

(1) [1895] P. 225.
(2) [1892] P. 161.
(3) [1895] P. 228, n. (4).
(4) [1898] P. 155.
(5) [1899] P. 19.

length than in the judgment now appealed from. From this former decision—a decision given by the judge of the Court below when sitting as Chancellor of the Diocese of Rochester—it is clear that he considered himself precluded from exercising the jurisdiction claimed mainly in consequence of the opinion expressed by Dr. Lushington in this Court in *Harper* v. *Forbes* (1), and approved of by the judges of the Court of Queen's Bench in *Reg.* v. *Twiss* (2), "that when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character." These propositions were not required for the decision of either of these cases, and are merely dicta. *Harper* v. *Forbes* (1) was a criminal suit in which the jurisdiction of the Court in cases of faculty did not really come in question; and in *Reg.* v. *Twiss* (2)—a case of prohibition, where the jurisdiction sought to be prohibited was the jurisdiction to grant a faculty for the erection of buildings for secular purposes on a churchyard — the prohibition was refused on the narrow ground that it was applied for at the instance of a stranger, whilst at the time of the application the Ecclesiastical Court had not exceeded its jurisdiction, and there was no reason for assuming that it would do so. There are two other cases which are relied on by the judge of the Court below as shewing that the jurisdiction of the Ecclesiastical Courts to grant faculties does not extend to cases like the present: *The Rector of St. George's, Hanover Square* v. *Stewart* (3) and *The Rector and Churchwardens of St. John, Walbrook* v. *The Parishioners of the Same.* (4) Of these cases, the first amounts to no more than a decision that, for some reason unexplained in the only short report of the case known, the faculty there applied for could not be granted in the absence of consent by the rector and parishioners; and the latter of the two cases, even if it was not decided on the point that the particular application for the faculty there prayed for ought to have been made to the Bishop of London

(1) 5 Jur. (N.S.) 275.
(2) L. R. 4 Q. B. 407.
(3) (1740) 2 Str. 1126.
(4) (1852) 2 Rob. 515; 16 Jur. 645.

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and not to the Consistory Court of London, is at least inconsistent both with the decision of Dr. Lushington in the very same year in *Campbell* v. *The Parishioners of Paddington* (1), where a faculty was granted for the erection of a vestry room on a portion of a consecrated churchyard without confining the use of the vestry room to be so erected to religious purposes, and with a similar decision by Sir Robert Phillimore in this Court in *In re Bettison.* (2) There is in fact no direct authority binding the Court either in favour of or against the jurisdiction in this case, and, having especial regard to the circumstances that the cemetery here is closed for burials, so that it is now illegal to bury there, it is submitted that the view taken by the Chancellor of the Diocese of London and the other Chancellors who agree with him is the correct view, and that the judge of the Court below possessed jurisdiction in his discretion to grant the faculty prayed for in this case.

If the Court should decide in favour of the jurisdiction, this is clearly a case where that jurisdiction should be exercised, and the petitioners ask that the Court should follow the precedent in *In re Bettison* (2), retain the cause, and decree the faculty to issue as prayed. [He also referred to *The Rector and Churchwardens of St. Gabriel, Fenchurch Street* v. *The City of London Real Property Co.* (3); *The Rector and Churchwardens of St. Ann, Soho* v. *The Parishioners of Soho* (4); The Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65); The Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), ss. 2, 3, and The Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34).]

No appearance had been entered for any respondent, and no person appeared as respondent at the hearing of the appeal.

Cur. adv. vult.

Aug. 2. SIR ARTHUR CHARLES. This is an appeal from the refusal by the Chancellor of the Diocese of Exeter to issue a citation on the petition of the rector and churchwardens of

(1) (1852) 2 Rob. 558.
(2) (1874) L. R. 4 A. & E. 294.
(3) [1896] P. 95.
(4) Consistory Court of London, July 19, 1900. *Times* Newspaper, July 20, 1900.

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the parish of Bideford, and of the mayor, aldermen, and burgesses of the town of Bideford, for a faculty to permit of a portion of a disused consecrated burial ground being thrown into the adjoining public highway. The learned judge of the Court below was of opinion that he had no jurisdiction to grant a faculty for the proposed purpose, and on that ground refused the citation. It appears from the petition—the allegations in which, for the purpose of this appeal, must be assumed to be accurate—that the corporation of Bideford are desirous of effecting a much-desired improvement by widening a street in the town of Bideford called Honestone Street, and with that object desire to add to the highway a portion of the old consecrated burial ground, containing about 337 square feet. The plan annexed to the petition, and an enlarged plan produced at the hearing, shew exactly what is proposed to be done. There is no doubt that the street along the boundary of the burial ground is at present inconveniently narrow—it is only 16 feet wide—and that it is quite inadequate for the traffic which passes along it. The street, it may be observed, is the main approach from the rectory, and the whole of one side of the town to the market-place and church, and immediately opposite the burial ground stands the national school. The alteration, if made, would therefore be not only for the general convenience and safety of the public, but particularly of the rector and many of his parishioners, as well as of all persons who use the school.

The burial ground was closed by an Order in Council made on July 4, 1893, the contents of which appear from a previous Order in Council dated May 16, 1893, and giving notice of the proposed making of the subsequent Order. In the piece of land in question there are five graves and two head-stones, and the petitioners have obtained the consent of the representatives of those interred in three of these graves. The representatives of those interred in the remaining two graves cannot be found, but in all these cases the petitioners, should a faculty be granted, undertake decently and reverently to remove the remains to another portion of the ground, and, in the case of the head-stones, to re-erect them in a suitable position to be

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approved by the rector and churchwardens. The corporation are prepared to pay for the accommodation asked for, the sum of 42*l.*, to be applied by the rector and churchwardens in repairing the burial ground walls and putting the ground itself in order, and, further, to erect a new and sufficient boundary wall of the same height as the present wall. In the petition this sum of 42*l.* is spoken of as "purchase-money" of the land itself; but what is really desired is not a faculty for the actual sale of the land, but a faculty for the use of the land as a part of the adjoining highway, the ownership of the soil remaining unaffected. The parish vestry has unanimously passed resolutions in support of this application.

Under these circumstances the vestry, the rector, and churchwardens, and the corporation, being all assenting parties, and the alteration proposed being undoubtedly for the convenience of the parishioners and the public, the case appeared to the learned judge of the Court below to be one in which, if it were within the power of the Court, the faculty should be granted, or, at all events, a citation be issued. But he was of opinion that he had no jurisdiction. "It has long been decided," he says, "by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg.* v. *Twiss* (1); *Harper* v. *Forbes.* (2) I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground.* (3) Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester* (4), in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances I cannot but feel great diffidence in restating my opinion, and were it not that the matter concerns my jurisdiction, and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point were carried to the

(1) L. R. 4 Q. B. 407.
(2) 5 Jur. (N.S.) 275.
(3) [1895] P. 225.
(4) [1899] P. 19.

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Court of Arches, and I hope this will be done in the present case." There is unquestionably a great diversity of practice in the dioceses of this province as to the grant of faculties of this description. Whilst on the one hand the learned judge of the Court below has refused to grant them on two occasions—the first in the diocese of Rochester, and now in the diocese of Exeter—they have been granted in various forms and with various limitations by Dr. Tristram, the Chancellor of the dioceses of London and Chichester, and by the Chancellors of the dioceses of Worcester, Lincoln, Llandaff, and Peterborough. In the diocese of London, in particular, since 1872 they have been repeatedly granted, and a history of the origin of the practice will be found in the judgment of the Chancellor of the Diocese of London in the case of *St. Botolph Without, Aldgate*. (1) The same learned judge, sitting as Chancellor of the Diocese of Chichester, in *In re St. Andrew's, Hove* (2), gives his reasons at length for holding that, in the case of a churchyard closed for burials, an Ecclesiastical Court has a discretionary power to make an order of the kind now asked for; and in the Leicester case, *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester* **v.** *Langton and Others* (3), all the authorities for and against the exercise of such a power were very fully considered by the Chancellor of the Diocese of Peterborough.

I believe I am correct in stating that, with the exception of the two cases to which the learned judge of the Court below referred, all the reported decisions on this subject are decisions of Consistorial Courts. But those two stand on a different footing, being decisions of the Court of Queen's Bench and of the Court of Arches respectively. The learned judge founded his judgment upon them; and if they do in fact decide the point now under consideration they no doubt bind him—as indeed they would also bind this Court. It is necessary, therefore, to examine them carefully, and I will proceed to do so, taking them in order of their date. *Harper* v. *Forbes* (4) was decided in this Court by Dr. Lushington in 1859. It was there proved

(1) [1892] P. 161.
(2) [1895] P. 228, n. (4).
(3) [1899] P. 19.
(4) 5 Jur. (N.S.) 275.

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that the churchwardens of a parish at Reigate, with the approval of the vicar, rural dean, and bishop, but without a faculty, had permitted a part of the parish churchyard to be taken into a public road, and a suit was instituted against the churchwardens by a parishioner praying for their canonical correction, and also asking for an order that the churchyard should be restored. At the hearing, the churchwardens did not deny that there had been a violation of the law, nor did they apply for a confirmatory faculty. The suit, therefore, was practically undefended, and the observations of the judge at the outset of the hearing were certainly not necessary to the decision. Nothing, as the learned judge points out in *In re Plumstead Burial Ground* (1), can be more emphatic than Dr. Lushington's statement of the law—a statement which repeated in substance observations he had made when Chancellor of the Diocese of London in *In re St. John's, Walbrook* (2); but so far as the decision is concerned, it leaves me free to consider whether the general proposition laid down is applicable to the facts with which I have now to deal—whether, in other words, it can be applied without qualification to consecrated ground where the purpose for which the ground was originally consecrated can no longer be lawfully carried out. In 1869 *Reg.* v. *Twiss* (3) came before the Court of Queen's Bench. In that case the guardians of the poor of a parish in the diocese of London applied to the Consistorial Court for a faculty—a confirmatory faculty—authorizing the erection on a consecrated burial ground of a chapel for the inmates of a workhouse and of certain other workhouse buildings. Before sentence a stranger to the parish applied for a prohibition on the ground that the Ecclesiastical Court had no jurisdiction to grant such a faculty. The application was refused for two reasons: first, because it was not clear that the faculty when granted would authorize more than the erection of the chapel, which would be a purely ecclesiastical purpose; and, secondly, because the applicant was a stranger to the parish. And the Chief Justice (Cockburn C.J.) in the

(1) [1895] P. 225, at p. 238. (2) 2 Rob. 515.
(3) L. R. 4 Q. B. 407.

course of his judgment, whilst expressing approval of the doctrine or proposition enunciated by Dr. Lushington, distinctly states that the application before the Court would be disposed of "on narrower grounds." There is nothing, therefore, in the decision itself binding on the Court, although the utmost respect is, of course, due to the dicta of the learned judges as to the general law regulating the power of the Ecclesiastical Courts to make orders with reference to the use of consecrated ground. It may be observed that the language of Dr. Lushington and the Chief Justice would, if strictly construed, render it impossible lawfully to grant a faculty for secular even though combined with ecclesiastical uses. Yet such faculties have been repeatedly granted by the Ecclesiastical Courts without objection. It seems to me, therefore, that whilst the dicta in deference to which the learned judge of the Court below acted, no doubt, accurately express in general terms the law upon the subject, they must be read with some sort of qualification, and I say so with the less hesitation because my eminent predecessor does not appear to have himself acted upon them in their entirety. Thus I find that within two months of his decision in *In re St. John's, Walbrook* (1), he granted, in *Campbell* v. *The Parishioners of Paddington* (2), a faculty for the erection of a vestry on ground which had been consecrated for a burial ground, but which had never been used and was not intended to be ever used for interments. He points out, it is true, in explanation of his decision, that a vestry room is employed for ecclesiastical as well as secular uses, but he did not limit the grant of the faculty to the former uses. On the contrary, the application being for a faculty for a new and suitable building for vestry or *other* parochial purposes, he granted it for both.

I may note in passing that the case of *St. George's, Hanover Square* v. *Stewart* (3), referred to in *Campbell* v. *The Parishioners of Paddington* (2) as illustrating the position that no faculty can be granted for the use of consecrated ground for any secular purpose whatever, does not appear to warrant quite

(1) 2 Rob. 515. (2) 2 Rob. 558.

(3) 2 Str. 1126.

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so general a proposition. There the parish was cited to appear to shew cause why a faculty should not be granted for the erection of a charity school on part of the churchyard, and eventually a prohibition was granted; but it is not clear upon what ground the Court proceeded. As far as can be gathered from the very brief report, I think the Chancellor of the Diocese of Peterborough is probably correct in his view that there was some "special and accidental impediment" to the grant of a faculty, "such perhaps as interference with some common law right": *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester* v. *Langton and Others.* (1)

There still remains one case to which reference should be made, because it is a decision of this Court. Sir W. Wynne is stated by Dr. Lushington to have refused a faculty to convert a part of the churchyard at Ewell into the public road. But no report exists of the circumstances of the case, and it is at any rate beyond question that at the time of the decision the churchyard must still have been available for the purposes for which it had been consecrated. Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. For example, it can no longer be built upon either temporarily or permanently (47 & 48 Vict. c. 72, s. 3; 50 & 51 Vict. c. 32, s. 4). The care of it is vested in the churchwardens where there is no burial board, and they are bound to maintain it in order and do the necessary repairs of the walls and fences (18 & 19 Vict. c. 128, s. 18), and their expenses are to be repaid out of the poor-rate. It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter* v. *Mountague* (2); and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty

(1) [1899] P. 19, at p. 27. (2) (1836) 1 Curt. 253.

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BIDEFORD PARISH, *In re.* BIDEFORD (RECTOR, &c.), *Ex parte.*

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for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not remain although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore, I am of opinion that this appeal must be allowed. I think that the discretion which the learned judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction; and if it be matter of discretion, there is no dispute that the faculty is one which ought to be granted. The proper course will, I think, be to follow the procedure adopted by Sir Robert Phillimore in *In re Bettison* (1); to retain the cause, and, as the allegations in the petition have been verified by an affidavit which was transmitted to this Court with the process and is now in the registry of this Court, to direct a faculty to issue to the rector and churchwardens authorizing the setting back of the present wall and the rebuilding it in the new position indicated on the plan annexed to the petition, upon the terms to which the petitioners have expressed their willingness to submit. The faculty must be subject to a proviso that the remains to be removed shall be reinterred in another portion of the burial ground to be selected by the rector and churchwardens.

Appeal allowed.

Solicitors for appellants: *Peard & Sons.*

(1) L. R. 4 A. & E. 294.

C. F. J.

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Matrimonial Law—Testamentary Law—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 18.

An unmarried Frenchwoman resident in England executed a holograph will in French and valid according to French law. Subsequently she set up a business in England and married there, according to English law, but without any settlement, a French refugee who had come over to escape a sentence of imprisonment passed on him by the French Court. After the marriage the business was continued by the husband and wife jointly, the husband taking in his own name leases of the business premises. About two years after the expiration of the period of prescription under the French law, the husband sold his interest in the business to his wife, assigned the leases to her, and returned to France and took up his permanent abode there. The wife remained in England and continued carrying on the business until her death:—

Held, by Rigby and Vaughan Williams L.JJ. (Lindley M.R. dissenting), that the domicil of the husband, and consequently of the wife, at the time of the marriage was English, and, therefore, that the question of validity of the ante-nuptial will was governed by English and not by French law, so that the will was revoked by the marriage.

Decision of Jeune P. reversed.

Per Lindley M.R.: Sect. 18 of the Wills Act, 1837, does not apply to the wills of foreigners domiciled abroad.

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DISSOLUTION OF MARRIAGE.
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DIVORCE—*Damages—Married Woman—Knowledge of Co-respondent—Absence of Evidence—Direction to Jury.*

Where in a petition by the husband for divorce on the ground of adultery claiming damages against the co-respondent, no evidence was given on behalf of the petitioner that the co-respondent knew that the respondent was a married woman:—

Held, that damages might, nevertheless, be assessed against the co-respondent.

The rules at common law in actions for crim. con. applied to claims for damages in divorce cases; and the direction of Tindal C.J. in *Calcraft* v. *Harborough (Earl of)*, (1831) 4 C. & P. 499, at p. 501, adopted and followed by Gorell Barnes J. LORD *v.* LORD AND LAMBERT
Gorell Barnes J. 297

2. —— *Desertion—Refusal by Wife, without Cause, of Marital Intercourse—Subsequent Adultery of Husband—Wife's Desertion no Bar to Relief—Decree of Judicial Separation.*

A wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, and is herself in such circumstances guilty of desertion without reasonable cause.

Desertion without reasonable excuse for two years and upwards is no bar to a petition for judicial separation on the ground of subsequent adultery. SYNGE *v.* SYNGE - **Jeune Pres. 180**

3. —— *Judicial Discretion—Adultery of the Wife—Cruelty of the Husband—Discretional Bar*

DIVORCE—*continued.*

—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree.*

The discretion conferred upon judges of the Divorce Court by s. 31 of the Matrimonial Causes Act, 1857, is not an absolute or arbitrary, but a judicial discretion, and is intended to be exercised in conformity with the former practice of the House of Lords. Cruelty on the part of a petitioner, in order to bar a claim for a divorce, must either have led to the adultery of the respondent, or be entirely wanton and unprovoked in its character.

In considering what terms should be imposed upon a petitioner who has been found guilty of cruelty towards the respondent, the Court takes into consideration all the facts of the particular case before it, and considers the interests not merely of the parties, but of the child or children (if any) of the marriage.

Where the means of the petitioner (husband) were very small and uncertain, and the respondent's parents, whose character and goodwill were unquestioned, had offered to look after the only child of the marriage, the Court, in granting a decree, assented to an arrangement which had been arrived at between the parties subsequently to the verdict, whereby the formal custody of the child was given to the respondent and no allowance was ordered against the petitioner. PRYOR *v.* PRYOR - - - - **Jeune P. 157**

4. —— *Practice—Acts of Adultery subsequent to Date of Petition—Evidence—Admissibility.*

Evidence of acts of adultery subsequent to the date of the petition may be admitted for the purpose of shewing what inference the Court ought to draw from evidence of previous acts of familiarity. WALES *v.* WALES AND CULLEN
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5. —— *Practice — Colonial Marriage — Evidence of Validity—Colony of Hong Kong.*

Where, upon the hearing of a petition to dissolve a marriage which had been celebrated in the Colony of Hong Kong, it was stated on behalf of the petitioner that the only legal expert available to give evidence of the validity of the marriage according to the laws and ordinances of Hong Kong, demanded a prohibitive fee, the Court gave leave to prove the marriage by reading an affidavit of an ex-governor of the Colony, who was not a member of the legal profession, but who deposed that he was conversant with the laws and ordinances in force in the Colony. COOPER-KING *v.* COOPER-KING **Gorell Barnes J. 65**

6. —— *Practice — Consolidated Suits — Petition for Restitution of Conjugal Rights—Answer alleging Adultery—Cross-petition, claiming Dissolution of Marriage—Questions for Jury — Onus probandi—Right to begin.*

Where a wife petitioned for restitution of conjugal rights, and the husband in answer alleged that she had committed adultery, and, in a cross-petition, claimed the dissolution of his marriage on that ground:—

Held, that the husband's counsel ought to begin. SMITH *v.* SMITH - **Jeune Pres. 66**

7. —— *Practice — Respondent a Person of Unsound Mind — No Appearance to Citation—Appointing Guardian ad litem—Obligation upon*

DIVORCE—*continued.*

Petitioner to apply—Divorce (Additional) Rules, 1875, r. 196—Rules of Supreme Court, Order XIII., r. 1.

Where a respondent, in a suit for dissolution of marriage, is a person of unsound mind not so found by inquisition, it is incumbent upon the petitioner, even though suing in formâ pauperis, to apply for an order that some proper person be assigned guardian of the respondent. GILES *v.* GILES - - - **Gorell Barnes J. 17**

8. —— *Settlements—Variation—Petition for Nullity — Impotence — Marriage Settlements — "Property Settled" — Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5—Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3.*

The jurisdiction of the Court, conferred by the 5th section of the Matrimonial Causes Act, 1859, and extended by the 3rd section of the Matrimonial Causes Act, 1878, to inquire into the existence of ante-nuptial and post-nuptial settlements, and to make orders varying the same, is not limited to any particular class of nullity cases, but includes all cases in which a decree of nullity has been pronounced, upon whatsoever ground.

"Property settled," within the meaning of the two sections, refers only to that particular property the benefit of which is, by the marriage settlement, conferred in the ordinary way on the parties or their children, and does not extend to or include the whole estate of the respondent, out of which the "property settled" may have been carved and which may be all mentioned in the schedules appended to the marriage settlement.

The Court has no power to bring into the settlement a fund or estate which is not to come into settlement until a certain event shall happen, before that event happens in fact. DORMER *v.* WARD - - - **Gorell Barnes J. 130**

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ECCLESIASTICAL LAW — *Faculty — Burial Ground—Jurisdiction—Grant of Faculty for use as Public Street of Portion of consecrated Cemetery or Churchyard closed for Burials, and setting back of Cemetery or Churchyard Wall—Retention of cause.*

The Ordinary has jurisdiction to grant a faculty authorizing a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector and churchwardens of a parish

ECCLESIASTICAL LAW—*continued.*

church in the diocese of Exeter, and the corporation of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the Ordinary for a faculty to authorize a strip of the cemetery being used for widening an adjoining public street, and the boundary wall of the cemetery being set back so as to form the boundary wall between the remaining portion of the cemetery and the widened street. It appeared that the street proposed to be widened was only 16 feet wide, and too narrow for the traffic along it, and that the proposed widening would be not only for the general convenience and safety of the public, but particularly of the rector and his parishioners, to the former of whom and the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corporation. It also appeared that the strip of the cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, and that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the Diocese of Exeter refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. The petitioners appealed to the Arches Court of Canterbury.

The Dean of Arches allowed the appeal, retained the cause, and the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of the petitioners. *In re* BIDEFORD PARISH. *Ex parte* RECTOR, &c., OF BIDEFORD
Arches Court of Canterbury 314

2. —— *Faculty—Burial Ground, Faculty for Erection of Churchyard Wall with Arcade on disused — Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3—Open Spaces Act, 1887 (50 & 51 Vict. c. 32), ss. 4, 14—Meaning of "Building"—Refusal of Faculty for Pictures at East End of Chancel of Parish Church—Discretion—Wishes of Parishioners—Evidence—Memorials.*

A faculty for the erection on a disused burial ground of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels of that side of the wall which would be inside the churchyard, was granted, the Ordinary being of opinion that the wall or structure in question was not a "building" prohibited to be erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887.

Where the vestry of a parish and the petitioners are unanimous, or substantially so, in favour of accepting a presentation picture of merit for the decoration of their parish church, the introduction of the picture into the church may be properly sanctioned by a faculty, unless the picture appears to be likely to be abused by superstitious reverence, or be otherwise inappropriate in a church, or be such as might reasonably give offence to present or future parishioners; but where it was proposed that such a picture should be introduced into the church of an admirably worked parish, and conscientious ob-

ECCLESIASTICAL LAW—*continued.*

jections which might be entertained by members of the congregation, without disparagement to the views of others in favour of it, were taken to it as a church decoration by a substantial minority of resident parishioners who were members of the Church of England, and it appeared that its introduction into the church would offend the religious feelings of that minority and introduce discord into the parish where it had never existed before, it was held to be the duty of the Court to refuse to grant a faculty for its introduction.

Instance of a faculty suit in which memorials and counter memorials signed by parishioners were admitted in evidence by consent. VICAR OF ST. BOTOLPH, ALDERSGATE WITHOUT *v.* PARISHIONERS OF SAME - - **Consist. Ct. of London 69**

3. —— *Faculty — Interest requisite for Promotion of Faculty Suit — Parishioners having Names on Rate-book—Ornaments of the Church—Architectural Decorations—Crucifixes—Ornaments Rubric*—3 & 4 *Edw.* 6, *c.* 10—*Refusal of Confirmatory Faculty—Churchwardens—Undertaking to Replace Tables of Commandments—Canon* 82 *of Canons of* 1603 — *Tabernacle for Reception of Reserved Sacrament.*

A crucifix is neither a lawful church ornament nor an architectural decoration the retention of which in a church can be authorized by faculty, and where a crucifix has been introduced into a parish church the Ordinary has jurisdiction to direct its removal by the churchwardens without proof that it is likely to have superstitious reverence paid to it.

A parishioner of a parish in the City of London whose name is on the rate-book as occupier of a room in the parish taken solely to enable him to bring a civil suit in the court, has a sufficient interest to promote a cause of faculty to obtain the removal of unlawful church ornaments out of the parish church of the parish of which he is a parishioner.

The curate in charge of a parish in which the incumbent was non-resident introduced into the parish without lawful authority two crucifixes, one a movable crucifix of brass about eighteen inches high placed on a Tabernacle for the Reserved Sacrament standing on the Retable in the chancel of the church, and the other a crucifix three feet in height affixed to the north wall of the church by the side of and slightly above the level of the pulpit: and during his tenure of office, from about 1880 to 1894, there were in the church, besides these crucifixes and Tabernacle, a censer and the Stations of the Cross; incense was used in the church, and during the Communion Service the wine was mixed with water. Between 1894 and 1898 a succeeding curate, the crucifixes and Tabernacle still remaining in the church, introduced there a picture of the Virgin Mary, and the next year a shrine to the Virgin Mary called an "Altar of Repose," and a statue of the Madonna and Child; and services were conducted in the church in which the crucifixes were used by the minister and members of the congregation for superstitious purposes. Afterwards an application was made by three parishioners for a faculty to authorize the removal of the crucifixes out of the church, and the incumbent and churchwardens appeared as opponents, and prayed for a confirmatory faculty for the retention of the crucifixes.

ECCLESIASTICAL LAW—*continued.*

It appeared that several past churchwardens and many of the parishioners had disapproved of and protested against the introduction and retention of the crucifixes, and that in 1898 another curate in charge had been appointed, whilst there was no evidence that during the time he had been the officiating minister the crucifixes had been used superstitiously.

It further appeared that before the hearing of the suit the Tabernacle for the Reserved Sacrament had been removed out of the church:—

Held, that the Court must refuse the prayer for a confirmatory faculty, and issue a faculty directing and authorizing the churchwardens as officers of the Ordinary to remove the crucifixes out of the church, because—first, they were either in themselves illegal church ornaments or illegal architectural decorations; and, secondly, if not in themselves illegal as church ornaments or architectural decorations, they were—having regard to the facts that they were introduced into the church for superstitious purposes, and were so used for nearly twenty years, and might be so used again, and had been a cause of offence to several churchwardens and parishioners, some of whom, though supporting a resolution of vestry against the petitioners, did not thereby express any opinion for their retention—articles and things the retention of which in the church it would be an unwise exercise of the discretion of the Court to authorize.

Semble: A Tabernacle for the reception of the Reserved Sacrament is not a lawful church ornament. KENSIT *v.* RECTOR OF ST. ETHELBURGA, BISHOPSGATE WITHIN **Consist. Ct. of London 80**

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HUSBAND AND WIFE—*Married Woman—Dignity—Title of Honour—Incorporeal Hereditament—Marriage with a Peer of the Realm—Divorce—Former Wife marrying a Commoner—Continued use of Title derived from former Husband—Courtesy Title—Jactitation of Marriage—Injunction.*

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.

A man has no such property in his name as to entitle him to prevent a woman, not his wife, claiming to be such, unless she does so maliciously.

Decision of Gorell Barnes J., [1900] P. 118, reversed. Cowley *v.* Cowley - C. A. 305

2. —— *Separation Order—Practice—Allowance for Wife—Husband's Earnings—Mode of Assessing Proportion to be allowed—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

In assessing the amount which a husband is to be ordered to pay for the support of his wife who has obtained a separation order against him under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), courts of summary jurisdiction are to be guided by the principles and practice upon which allotments of alimony are made in cases of judicial separation in the High Court. Cobb *v.* Cobb Div. Ct. 294

3. —— *Separation Order—Practice—Wife's Costs—Husband's Appeal—Case remitted to Justices—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

Where a wife has obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, she is entitled to her costs of defending that order, when challenged, even though she should prove unsuccessful in the Divisional Court.

A husband and wife separated in 1887, when a document headed "Memorandum of Agreement" was signed by them and witnessed by a solicitor. Twelve years later the wife returned from abroad, went to her husband's house, and was refused admission. She thereupon took out a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with neglect to maintain her, and by such neglect causing her to leave and live separate and apart from him. The husband and wife were the only witnesses before the justices, who made an order for separation and allowance in favour of the wife.

Upon appeal:—

Held, that as the document was conclusive one way or the other, and as the justices had not had all the evidence before them to enable them properly to test its validity, the case must go back for rehearing; but the appellant was ordered to pay the respondent's costs on the appeal. Medway *v.* Medway - - - Div. Ct. 141

4. —— *Separation Order—Rescinding Order—"Fresh Evidence"—Definition—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 7.

"Fresh evidence" within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, to confer jurisdiction to rescind a separation order previously made under s. 4, must be such as would afford ground for a new trial or rehearing in any other class of case. It must be evidence which could not reasonably have been made available at the date of the order, or it must relate to something which has happened since the date of the order, and which affords ground for revision within the terms of the Act under which the order was made. Johnson *v.* Johnson - - - - Jeune Pres. 19

—— Dissolution of marriage.
See Cases under Divorce.

—— Summary Jurisdiction (Married Women) Act—Appeals—Notes of proceedings in Court below - - 145, 147
See Practice. 1, 2.

—— Will—French subjects—English marriage—Change of domicil—Intention—Revocation of ante-nuptial will - 211
See Conflict of Laws.

IMPOTENCE—Nullity—Marriage settlements—Petition for variation—"Property settled" - - - - 130
See Divorce. 8.

INFANT—Will and codicils—Informalities—Infants interested—Practice—Probate granted on motion - - - 208
See Probate. 5.

INJUNCTION—Title of honour—Divorce—Former wife marrying a commoner—Continued use of title derived from former husband - - - - 305
See Husband and Wife. 1.

INSURANCE, MARINE—*Time Policy—Repairs to Ship—Particular Average Loss—Subsequent Total Loss—Assured not Liable for Cost of Repairs—Non-liability of Underwriters.*

A vessel, under a charter to load home, sustained damage on the outward voyage which was repaired on arrival at the port of loading, and a payment on account of the particular average loss was made to the shipowners by the underwriters on a time policy on hull and machinery.

The repairs were paid for at the port of loading by the charterers as disbursements secured by a draft in their favour (including commission and insurance), signed by the master, pledging the ship for repayment on safe arrival at the port of discharge. This draft was insured by the charterers. The vessel was totally lost on the homeward voyage; and the underwriters on the time policy paid for a total loss, but the shipowners brought an action against them to recover the balance of the particular average loss. The underwriters counter-claimed for a return of the payment on account:—

Held, by Gorell Barnes J., first, that the shipowners could not recover as they were never personally liable for the cost of the repairs, and had sustained no loss, the amount of the draft, on the loss of the ship, having been paid to the charterers by their insurers; secondly, that the underwriters were entitled to a return of the amount paid on account, as a payment made without prejudice and under a mistake of fact. THE DORA FORSTER - Gorell Barnes J. 241

INTERNATIONAL LAW—Private International law—French subjects—English marriage—Change of domicil—Intention—Revocation of ante-nuptial will - 211
See CONFLICT OF LAWS.

INTESTACY—Grant of administration.
See Cases under PROBATE.

IRISH LAW—*Marriage in Protestant Episcopalian Church—Certificate—Proof of Marriage—Evidence.*

A copy of an entry in the register of marriages, duly certified by the clergyman of the church where the marriage so registered has been solemnized, is sufficient to prove a lawful marriage according to the rites and ceremonies of the Protestant Episcopalian Church of Ireland. WHITTON *v.* WHITTON - - Jeune Pres. 178

JACTITATION OF MARRIAGE—Title of honour—Former wife marrying a commoner—Continued use of title derived from former husband—Injunction - 305
See HUSBAND AND WIFE. 1.

JUDICIAL SEPARATION—Refusal of wife, without cause, of marital intercourse—Subsequent adultery of husband—Wife's desertion no bar to relief - - 180
See DIVORCE. 2.

JURISDICTION—Bond for safe return—Forfeiture—Co-ownership—Action of restraint 47
See SHIPPING. 2.

—— Faculty—Grant of faculty for use as public street of portion of consecrated cemetery closed for burials - - - 314
See ECCLESIASTICAL LAW. 1.

JURISDICTION—*continued.*

—— Summary jurisdiction.
See SUMMARY JURISDICTION.

JUSTICES—Summary Jurisdiction (Married Women) Act—Appeals—Notes of proceedings in Court below - 145, 147
See PRACTICE. 1, 2.

—— Summary Jurisdiction (Married Women) Act—Case remitted to justices—Wife's costs - - - - - 141
See HUSBAND AND WIFE. 3.

LACHES—Action for revocation of letters of administration—Acquiescence - 56
See PROBATE. 10.

LETTERS OF ADMINISTRATION.
See Cases under PROBATE.

LIABILITY—Limitation of—Exemption from registry—"Tons burden"—"Register tonnage" - - - - 24
See SHIPPING. 9.

—— Luggage—Loss of—Free pass by railway and steamer—Conditions of non-liability
See SHIPPING. 10. 161

LIGHTS—Collision—Anchor light—"Forward part of the vessel" - - - 262
See SHIPPING. 5.

LIMITATION OF LIABILITY—Exemption from registry—"Tons burden"—"Register tonnage" - - - - 24
See SHIPPING. 9.

LUGGAGE—Loss of—Free pass by railway and steamer—Conditions of non-liability—Limitation suit - - - 161
See SHIPPING. 10.

LUNACY—Respondent a person of unsound mind—No appearance to citation—Appointing guardian ad litem - - 17
See DIVORCE. 7.

MAGISTRATES.
See JUSTICES.

MARINE INSURANCE—Time policy—Repairs to ship—Assured not liable for cost of repairs—Non-liability of underwriters
See INSURANCE, MARINE. 241

MARRIAGE—Colonial marriage—Evidence of validity - - - - 65
See DIVORCE. 5.

—— Dissolution of.
See Cases under DIVORCE.

—— Ireland—Marriage in Protestant Episcopalian Church—Certificate—Proof of marriage—Evidence - - 178
See IRISH LAW.

MARRIAGE SETTLEMENT—Variation—Petition for—"Property settled"—Nullity—Impotence - - - 130
See DIVORCE. 8.

MARRIED WOMAN.
See Cases under HUSBAND AND WIFE.

MARRIED WOMAN—*continued.*

—— Title of honour — Divorce—Former wife marrying a commoner—Continued use of title derived from former husband—Injunction - - - - 305
See HUSBAND AND WIFE. 1.

MATRIMONIAL CAUSES ACTS.
See Cases under DIVORCE.

MEMORIALS—Evidence—Admissibility - 69
See ECCLESIASTICAL LAW. 2.

MERCHANT SHIPPING.
See Cases under SHIPPING.

NAME—Dissolution of marriage—Dignity of title of honour—Continued use of, derived from former husband — Injunction to restrain - - - - 305
See HUSBAND AND WIFE. 1.

NEGLIGENCE—Liability of owner for, of contractor — Sunken wreck in navigable river—Contract to raise - - 105
See SHIPPING. 12.

—— "Management" of vessel—Bill of lading incorporating the Harter Act—Damage to cargo - - - - 112
See SHIPPING. 1.

NEXT OF KIN—Grant of administration.
See Cases under PROBATE.

NOTES—Summary Jurisdiction (Married Women) Act—Appeals—Notes of proceedings in Court below - - - 145, 147
See PRACTICE. 1, 2.

NULLITY — Impotence — Marriage settlements — Petition for variation — "Property settled" - - - - 130
See DIVORCE. 8.

OPEN SPACES—Faculty for erection of churchyard wall with arcade on disused burial ground - - - - 69
See ECCLESIASTICAL LAW. 2.

PETITION—Marriage settlements—Variation—"Property settled" — Nullity — Impotence - - - - - 130
See DIVORCE. 8.

PICTURES—Faculty for pictures at east end of chancel of parish church refused 69
See ECCLESIASTICAL LAW. 2.

POLICY—Time policy—Repairs to ship—Assured not liable for cost of repairs — Non-liability of underwriters - - 241
See INSURANCE, MARINE.

PRACTICE — *Appeal — Notes of Proceedings in Court below—Copies required for Use of Divisional Court—Costs—Taxation — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the appellant to furnish, for the use of the judges of the Divisional Court, two copies of the notes taken by the clerk of the Court below, and the costs of these copies will be allowed on taxation. WALTON *v.* WALTON - **Div. Ct. 147**

PRACTICE—*continued.*

2. —— *Appeal—Notes of Proceedings in Court below—Duties of Magistrates' and Justices' Clerks—Right of either Party to a Copy of Notes—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the magistrate or justices to make a note, not only of the evidence and of the decision arrived at, but also of the reasons for arriving at the decision, and to furnish a copy of the note upon the application of either party. COBB *v.* COBB - **Div. Ct. 145**

—— Costs—Severance of defendants — Probate action—Separate sets of costs - 118
See PROBATE. 2.

—— Divorce.
See Cases under DIVORCE.

—— Probate.
See Cases under PROBATE.

—— Separation order — Summary Jurisdiction (Married Women) Act - 19, 141, 294
See HUSBAND AND WIFE. 2—4.

—— Undertaking, Solicitors'—Salvage—Arrest—Damages - - - - 171
See SHIPPING. 11.

PRIVATE INTERNATIONAL LAW — French subjects—English marriage—Change of domicil—Intention—Revocation of antenuptial will - - - - 211
See CONFLICT OF LAWS.

PROBATE — *Citation — Executor — Absence from England—No Citation—Grant of Administration to Nominee of Assignees of Residuary Legatee—Practice.*

A testator died in 1890, leaving a will and codicil appointing executors, who duly proved. One of the executors died shortly afterwards, and in 1891 the other went abroad and had intimated that he had no present intention of returning to England, or of acting further as executor.

The Court, without requiring citation or any formal notice to be served upon the executor, granted administration de bonis non, with the will and codicil annexed, in favour of the nominee of the assignees of the residuary legatee. IN THE GOODS OF CAMPION - **Gorell Barnes J. 13**

2. —— *Costs—Severance of Defences—Practice—Good Cause—Probate Action—Action tried with a Jury—Separate Sets of Costs—Rules of Supreme Court, Order* LXV., *r.* 1.

An action to establish the third, and, alternatively, the second, will of a testator, was separately defended by the executors of the first will and two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The jury found that the execution of the two last wills was obtained by undue influence, and the judge pronounced against them and for the first will:—

Held, that there was a sufficient divergence of interest between the defendants to justify the legatees in appearing by separate counsel, and that, consequently, there was no good cause for

PROBATE—*continued.*

depriving them of the costs of their separate appearance.

Decision of Gorell Barnes J. reversed. BAGSHAW *v.* PIMM - - - - **C. A. 148**

3. —— *Foreign Domicil—Next of Kin out of the Jurisdiction—Assets and some Beneficiaries in England—No Executor—Grant to Stranger without Citing Next of Kin—Practice—Administration with Will annexed—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The testatrix, who died domiciled in the Republic of Hayti, left a will which was valid by the law of her domicil, but not executed with the formalities prescribed in the Wills Act. There was no appointment of executors, but the will contained the words: "M. E. Bordu of Port-au-Prince and Mr. J. B. Wallace of Liverpool shall carry out my last wishes."

The only estate in England consisted of a sum of 1260*l.* 7*s.* 11*d.* in the hands of Mr. Wallace's firm.

The sole next of kin, who was entitled in distribution to half the fund, was in Hayti and had not been cited; but the persons entitled to the other half were in England, and assented to Mr. Wallace being appointed administrator with the will annexed.

The Court appointed Mr. Wallace administrator (with the will annexed) under s. 73 without requiring the next of kin to be cited. IN THE GOODS OF MOFFATT - - **Jeune Pres. 152**

4. —— *Foreign Railways, Shares in—Grant of Administration de bonis non—Intestacy—Legal Estate outstanding in the Intestate—Beneficial Owner a Bankrupt—Limited Grant to Trustee in Bankruptcy.*

A. being the owner of certain shares in two foreign railway companies handed the certificates to C., who received the dividends as beneficial owner until he became bankrupt, after which the trustee in C.'s bankruptcy received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares; and administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bankruptcy,

The Court (Jeune P.) granted administration to him, in respect of the unadministered estate of A., limited to the shares in the two foreign railway companies. IN THE GOODS OF AGNESE **Jeune Pres. 60**

5. —— *Informalities—Practice—Will and Codicils—Infants interested—Probate granted on Motion.*

Where a testatrix left three testamentary papers, two of which contained certain informalities and affected the interests of infants, the Court, being of opinion that, if the usual practice were insisted upon and the documents propounded in solemn form, the result would be to establish all three documents, granted probate thereof, on motion, to the executors. IN THE GOODS OF O'BRIEN - - - **Jeune Pres. 208**

6. —— *Intestacy—Father and Son—Doubt as to who died first—Grant of Administration—*

PROBATE—*continued.*

Probate Act, 1857 (20 & 21 *Vict. c.* 77)—*Grant under s.* 73.

Where a person who left no will was presumed to have died "in or since 1863," and his father died in 1866, also intestate, the Court made a grant under s. 73 to a brother of the presumed deceased, no representative of the father's estate having been appointed. IN THE GOODS OF HARLING - - - - **Jeune Pres. 59**

7. —— *Renunciation—Retractation—Practice—Grant of Administration de bonis non—Joint Grant to three Persons.*

In 1896 A. H. T. died bankrupt and intestate, leaving a widow, who was his second wife, and six children surviving. His estate was in the hands of an official receiver in bankruptcy. The widow and children duly renounced all rights to administration, and the official receiver took the grant to A. H. T.'s estate, and also a grant de bonis non to the estate of A. H. T.'s first wife.

In 1899 the administrator, having paid all the debts, desired to be relieved of his office, and, with his concurrence, the Court (Gorell Barnes J.) permitted the widow and children to retract their renunciations; revoked the letters of administration; and made a joint grant to the widow and two of the children, in respect of that portion of A. H. T.'s estate remaining unadministered, thus giving them the right, as of course, to take administration de bonis non in the estate of A. H. T.'s first wife. IN THE GOODS OF THACKER - - - **Gorell Barnes J. 15**

8. —— *Re-sealing—Grant of Administration—Intestacy—Colonial Grant.*

Where the executors of a will, under which a legacy of 250*l.* was payable to the "personal representatives" of the testator's brother, who died intestate domiciled in one of the Australian Colonies leaving no estate in this country, insisted on the re-sealing here of a grant of letters of administration which the brother's widow had obtained in the Colony.

The Court allowed the grant to be re-sealed. IN THE GOODS OF SANDERS **Gorell Barnes J. 292**

9. —— *Revocation—Practice—Administration de bonis non—Former Administratrix—Disappearance—Revocation of Grant—Fresh Grant to one of the Next of Kin.*

The practice by which a grant of administration may be revoked and a fresh grant made in the absence of the holder of the outstanding grant, is not confined to cases where administration has been taken by creditors.

Where an intestate died leaving a widow and six children by a former marriage, and the widow, who obtained administration, could not be found, the Court, upon the application of the children, revoked the grant and directed administration de bonis non in favour of one of their number. IN THE GOODS OF LOVEDAY **Jeune Pres. 154**

10. —— *Revocation of Letters of Administration, Action for—Claim as Next of Kin after Distribution of Intestate's Estate—Grant of Administration—Laches—Acquiescence.*

The plaintiff, who claimed to be entitled as next of kin of an intestate, three years after the

PROBATE—*continued.*
distribution of the estate, sought to impeach the title of the persons amongst whom the estate had been distributed, on the ground of the illegitimacy of one of their ancestors, and for this purpose commenced an action for revocation of letters of administration which had been granted to one of the persons who had received a share of the estate under the distribution. The plaintiff was aware at the date of the distribution of the alleged illegitimacy, but pleaded want of means in justification of the delay in bringing the action:—

Held, that the action was not maintainable, because (1.) the plaintiff's object might be obtained, without revoking the letters of administration, by commencing an action in the Chancery Division for the purpose of following the assets into the hands of the persons who had wrongly received them; (2.) the plaintiff was debarred by laches and acquiescence from prosecuting her claim.

Decision of Gorell Barnes, J., [1899] P. 211, affirmed. MOHAN *v.* BROUGHTON - C. A. 56

PROOF — Marriage — Evidence — Certificate — Ireland—Marriage in Protestant Episcopalian Church - - - - 178
See IRISH LAW.

RENUNCIATION — Retractation — Administration de bonis non—Joint grant to three persons - - - - 15
See PROBATE. 7.

RE-SEALING — Administration — Intestacy — Colonial grant - - - 292
See PROBATE. 8.

RESTITUTION OF CONJUGAL RIGHTS—Petition for—Cross-petition claiming dissolution of marriage—Right to begin - 66
See DIVORCE. 6.

RESTRAINT—Action of—Co-ownership—Bond for safe return—Forfeiture—Jurisdiction - - - - - 47
See SHIPPING. 2.

RETRACTATION — Renunciation — Administration de bonis non—Joint grant to three persons - - - - 15
See PROBATE. 7.

REVOCATION — Grant — Former administratrix —Disappearance—Fresh grant to one of next of kin - - - - 154
See PROBATE. 9.

—— Letters of administration—Action for revocation of—Laches—Acquiescence 56
See PROBATE. 10.

—— Will in French form—French subjects—English marriage—Change of domicil—Intention—Revocation of ante-nuptial will - - - - - 211
See CONFLICT OF LAWS.

RULES OF SUPREME COURT:—
—— Order XIII., r. 1—*Default in Appearance* - - - - - 17
See DIVORCE. 7.

RULES OF SUPREME COURT—*continued.*
—— Order XXIX., rr. 12, 18—*Releases in Admiralty Actions* - - - 171
See SHIPPING. 11.

—— Order LXV., r. 1—*Costs* - - 148
See PROBATE. 2.

SALVAGE—Practice—Solicitors' undertaking—Arrest—Damages - - - 171
See SHIPPING. 11.

SEALING—Administration—Intestacy—Colonial grant—Re-sealing - - - 292
See PROBATE. 8.

SEPARATION ORDER—Summary Jurisdiction (Married Women) Act - 19, 141, 294
See HUSBAND AND WIFE. 2—4.

SETTLEMENT—Variation—Petition for—"Property" — "Settled" — Nullity — Impotence - - - - 130
See DIVORCE. 8.

SEVERANCE—Of defences—Separate sets of costs—Probate action - - 148
See PROBATE. 2.

SHIPPING—*Bill of Lading—Damage to Cargo—Bill of Lading incorporating the Harter Act (Act of Congress of U.S.A., February* 13, 1893)*—Negligence in "Management" of the Vessel.*

Cargo was shipped at a port in the United States under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

During the voyage the vessel met with heavy weather, and, the forecastle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold, and damaging a portion of the cargo. The owner of the cargo sought to render the shipowner liable:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), reversing the decision of a county court judge, that the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, the act having been done for the purpose of rendering the forecastle habitable, that is, with the object of rendering the ship proper for the purpose for which she was intended.

The Glenochil, [1896] P. 10, followed. THE RODNEY - - - - Div. Ct. 112

2. —— *Bond for Safe Return—Forfeiture—Jurisdiction—Discretion of Court—Co-ownership—Action of Restraint.*

By a bail bond, in an action of restraint, the sureties submitted themselves to the jurisdiction of the Court, and consented "that if the (named vessel) shall not safely return to the port of Liverpool, and the defendants (the owners of the vessel other than the plaintiff) shall not, in such case, pay to the plaintiff (the appraised value of his shares), execution may issue" against them.

The vessel which, at the time the bond was

given, had been despatched by the defendants on a voyage from Hartlepool to Calcutta, arrived at Dundee in Scotland, and left again on a voyage to New York there to load for Australian ports.

On motion by the plaintiff, Gorell Barnes J. pronounced the bond forfeited, and ordered the amount to be paid into court with liberty to the sureties to shew cause.

The defendants appealed:—

Held, by the Court of Appeal (A. L. Smith, Rigby, and Collins L.JJ.), that there was jurisdiction to make the order, and, assuming a discretion in the Court in respect of the enforcement of a security given to the Court, that discretion has been rightly exercised, as the condition of the bond for safe return was not limited to the case of the vessel being lost, but was broken by the ship, instead of returning to Liverpool, being taken to a port out of the jurisdiction of the English Admiralty Court, and then sent on another voyage. THE CAWDOR - C. A. 47

3. —— *Charterparty—Damage to Cargo—Excepted Perils—Discharge in Port of Refuge—Refusal of Shipowner to Reload—Abandonment of Voyage—Duty of Master.*

Owing to stress of weather, a vessel, after sailing under charter from Cardiff for Cape Town with coals, put into a port of refuge. The coal was discharged partly to effect the necessary repairs to the ship, and partly for the benefit of the cargo, portions of which had become heated from wetting by excepted perils of the sea. After the repairs to the ship were completed, the charterer required the shipowner to reload the coal; the shipowner refused on the ground that in the opinion of the surveyors on both sides the coal was not then in a fit state for re-shipment, though, subsequent to the commencement of an action by the charterer against the shipowner for breach of contract, the coal had dried sufficiently to be carried on if the small coal were eliminated from the bulk:—

Held, by Gorell Barnes J., that the charterer was not entitled to recover, as, at the date of the issue of the writ, there was no breach of contract by the shipowner. Up to that time, on the evidence before him, the master, acting on behalf of the shipowner, was justified in refusing to carry on the cargo, and was not bound to wait an indefinite period until experts should be agreed that, the coal being dry, there would be no further risk of spontaneous combustion on a voyage through the tropics, provided the excessive amount of small coal, due to repeated handlings, were removed, for which no facilities existed at the port of refuge, except at an expense out of proportion to the value of the cargo.

Observations of Willes J. in *Notara* v. *Henderson*, (1872) L. R. 7 Q. B. 225, at p. 237, applied. THE SAVONA - Gorell Barnes J. 252

4. —— *Collision—Action against Tow and Tug—Decree by Default against Tow—Decree that Plaintiff's Ship and Tug were both to Blame—Division of Loss.*

A Norwegian barque, whilst in tow of a tug in the Bristol Channel, came into collision with, and sank, a third vessel. The plaintiffs, owners of the third vessel, brought an action in rem against the owners of the barque and the owners of the tug. The owners of the barque having allowed judgment to go by default, the barque was sold by the marshal under a decree condemning that vessel in the amount of the plaintiffs' damage.

The action proceeded against the tug, and resulted in a decree pronouncing both the plaintiffs' vessel and the tug to blame, and condemning the owners of the tug in a moiety of the plaintiffs' damage. On the question of the division of loss:—

Held, by the Court of Appeal (A. L. Smith and Vaughan Williams L.JJ.), affirming the decision of Bucknill J., that the plaintiffs were entitled to the proceeds in court of the barque, in part satisfaction of the whole of their damage under the decree by default against that vessel, and that they were also entitled to a moiety of their damage from the owners of the tug, under the decree of both to blame, the proceeds of the barque, and the moiety due from the owners of the tug, taken together, not exceeding the whole of the plaintiffs' loss.

The Englishman and the Australia, [1894] P. 239, distinguished. THE MORGENGRY AND THE BLACKCOCK - - - - C. A. 1

5. —— *Collision—Anchor Light—"Forward part of the Vessel"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 11.

By art. 11 of the Regulations for Preventing Collisions at Sea, "a vessel of 150 feet or upwards in length, when at anchor, shall carry" two anchor lights, one "in the forward part of the vessel . . . ."

Held, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), overruling Bucknill J., [1900] P. 43, that a vessel 313 feet in length, at anchor, with the forward light hanging from the foreshroud of the starboard forerigging 72 feet abaft the stem, was, on the true construction of the wording of the article, carrying it "in the forward part of the vessel." THE PHILADELPHIAN - C. A. 262

6. —— *Collision—Barges in Tow—Thames By-laws*, 1898, *r.* 11—*Anchor Ring Awash.*

The plaintiffs' and the defendants' barges, in tow of a tug in the river Thames, came into collision, owing to the defendants' barge being affected by the wind and tide whilst the tug was temporarily brought up, and the anchor hanging, ring awash, from the bows of the defendants' barge pierced the quarter of the plaintiffs' barge doing damage:—

Held, by Gorell Barnes J., that the plaintiffs were entitled to recover, for though, by rule 11 of the Thames By-laws, the anchor must be as low as ring awash, it may—according to the interpretation put upon the rule in *The J. R. Hinde*, [1892] P. 231—be as much lower as is thought proper, and those in charge of the defendants' barge were negligent in not having it sufficiently low in the water to avoid danger to other barges in case of contact in the course of the ordinary incidents of navigation in the river. THE SIX SISTERS - - Gorell Barnes J. 302

7. —— *Collision—Single Ship and Fleet of*

SHIPPING—*continued.*

Warships—Crossing Rules—Special Circumstances—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 27, 29—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 741.

On a fine clear night in the English Channel those in charge of a tug and tow saw, about six miles off and about five points on their port bow, the electric lights of a fleet which proved to consist of thirty warships steaming in company, and proceeding at a speed of ten knots an hour on a course S. 72° E.

The tug and tow were making about six knots an hour on a course N. 9° E., and, acting under art. 21 of the Regulations for Preventing Collisions at Sea, kept their course and speed. They passed across and ahead of the first of the four lines of the fleet, and were crossing ahead of the second line, when the defendant, the navigating officer in charge of the leading vessel of that line—acting under the Queen's Regulations corresponding with art. 19 of the Regulations for Preventing Collisions at Sea—kept out of the way of the tug by porting, but negligently omitted to notice the lights indicating the tow, and, starboarding back again, struck the tow and sank her.

In an action by the owner of the tow it was admitted that the defendant was to blame, and Gorell Barnes J. held that he was solely to blame, as he could, by the exercise of reasonable care, have avoided the collision, the position and movements of the fleet, in the opinion of the Elder Brethren, not constituting such a danger of navigation or collision, or such circumstances, as to render it necessary for the tug and tow to depart from art. 21, and, under art. 27, avoid immediate danger by keeping out of the way of the fleet. The defendant appealed on the ground that the tug and tow were also to blame for not complying with art. 27:—

Held, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), on the advice of the nautical assessors, that it was improper navigation, as a matter of seamanship, for the tug and tow to attempt, in the circumstances, to pass across and ahead of the fleet; but the Court dismissed the appeal, on the ground that—under the common law doctrine of contributory negligence, as applied in *The Margaret* (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873—though the tug and tow had been guilty of negligence in keeping on, yet the defendant was not hampered by the other vessels of the fleet, and might, by the exercise of ordinary care and diligence, have avoided the collision.

The construction to be placed on arts. 27 and 29 of the Regulations for Preventing Collisions at Sea considered.

The effect of s. 741 of the Merchant Shipping Act, 1894, in exempting Her Majesty's ships from the provisions of the Act, discussed. H.M.S. Sans Pareil - - **C. A. 267**

8. —— *Collision—Vessel Turning Round—Thames By-laws*, 1898, *art.* 48.

Art. 48 of the Thames By-laws, 1898, by which steam vessels "crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down," does not apply to a steam vessel turning round on the same side of the river as that on which she is being navigated, although, when athwart the river, in the process of turning, part of her may, owing to her length, be across the line of mid-stream.

The River Derwent, (1891) 7 Asp. M. L. C. 37, distinguished. The John Hollway

Bucknill J. 37

9. —— *Limitation of Liability—Exemption from Registry—"Tons Burden"—"Register Tonnage"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-s.* 1; *s.* 503, *sub-s.* 2 (*a*).

By s. 3, sub-s. 1, of the Merchant Shipping Act, 1894, ships not exceeding 15 "tons burden" employed solely in navigation on the rivers or coasts of the United Kingdom are exempted from registry. By s. 503, sub-s. 2 (*a*), the owners of a steamship shall not, where, without their actual fault or privity, any loss or damage is caused to any other vessel, by reason of the improper navigation of their steamship, be liable to damages beyond 8*l.* for each ton of the "gross tonnage" of the steamship:—

Held, by the Court of Appeal (A. L. Smith, Collins, and Vaughan Williams L.JJ.), affirming the decision of Gorell Barnes J., [1899] P. 45, that, under s. 3, a small tug—solely employed in the manner mentioned in the section—of the "gross tonnage," if measured in accordance with the Act, of 35·99 tons, was exempted from registry as the words "tons burden" referred to the net tonnage, and, therefore, under the rules laid down in the Act, involved the deduction from her "gross tonnage" of the allowances for engine-room and crew space, which reduced her tonnage to less than 15 "tons burden."

Secondly, that, as the vessel was properly exempted from registry, her owners were entitled, under s. 503, to limit their liability to 8*l.* for each ton of her gross tonnage ascertained by measuring her in accordance with the Act. The Brunel - - - - - **C. A. 24**

10. —— *Limitation Suit—Free Pass by Railway and Steamer—Conditions of Non-liability—Claim against Fund—Loss of Life—Loss of Luggage—Lord Campbell's Act* (9 & 10 *Vict. c.* 93)—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

A free pass, obtained by an official of another railway company, for himself and wife, from the London and South Western Railway Company, for the journey from London to Jersey, referred, on the face of it, to the following condition printed on the back: "That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

Through the negligence of the servants of the railway company, and during the transit from Southampton to the Channel Islands, the steamer stranded, and the official was drowned. His own, and his wife's, luggage were also lost.

The widow on behalf of herself and infant children claimed, against the fund paid by the

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railway company into court in a limitation suit, for the loss of her husband and father of the children. The registrar disallowed the claim. On appeal:—

Held, by Gorell Barnes J., affirming the decision of the registrar, that, in respect of the loss of life, as the widow and children could only claim under Lord Campbell's Act, where, if death had not ensued, the party injured would have been entitled to maintain an action for damages, the conditions on which the free pass was granted, and which the deceased must, from his official position, be taken to have known, included the sea passage as well as the land transit, and barred the claim:

Held, also, that in respect of the claim by the widow, as administratrix of her husband, for the loss of his personal effects, and in her own right, for the loss of her luggage, the condition attaching to the pass equally precluded any claim, for the London and South Western Railway special Act of 1848—under ss. 47, 48, 49 of which (made perpetual by an Act of 1860) the company is empowered to maintain steamers—is not controlled by s. 31 of the subsequent Railway Clauses Act, 1863, extending to steamers the provisions of s. 7 of the Railway and Canal Traffic Act, 1854.

The words "or other things whatsoever on board the ship" in s. 503, sub-s. 1 (*b*), of the Merchant Shipping Act, 1894, include passengers' luggage. THE STELLA **Gorell Barnes J. 161**

11. —— *Salvage—Practice—Solicitors' Undertaking — Arrest — "Good and Sufficient Reason" — Damages — Rules of Supreme Court*, 1883, *Order* XXIX., *rr.* 12, 18.

The defendants' solicitors signed, without qualification, a notice, under Order XXIX., r. 12, of the Rules of the Supreme Court, 1883, by which they undertook to enter an appearance and give bail in a sum not exceeding the value of ship, cargo, and freight; but the plaintiffs—notwithstanding the caveat which on the filing of the above notice in the registry had been thereupon entered—took out, under rule 18 of the same order, a warrant for the arrest of the defendants' vessel in a salvage action:—

Held, by Gorell Barnes J., that the defendants' solicitors, by signing the undertaking without qualification, rendered themselves personally responsible, and the plaintiffs might have taken a reasonable time to make inquiry whether the undertaking was satisfactory; but as, instead of doing so, they had insisted upon the security of the ship, the plaintiffs had failed to shew "good and sufficient reason" within the meaning of rule 18 of the same order, for arresting the vessel, and must, therefore, be condemned in damages and costs. THE CRIMDON **Gorell Barnes J. 171**

12. —— *Wreck—Sunken Wreck in Navigable River—Contract to Raise—Liability of Owner for Negligence of Contractor.*

A barge belonging to the defendants, without negligence on their part, was sunk in the fairway of the river Thames. They employed an under-waterman to conduct the salvage operations necessary to raise her and, for that purpose, put him in possession and control; but, owing to

SHIPPING—*continued.*

the guard-vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage:—

Held, by the Court of Appeal (A. L. Smith, Rigby, and Collins L.JJ.), affirming the decision of Gorell Barnes J., [1899] P. 74, that the defendants were personally responsible, as (following *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72), they were bound to see that the necessary precautions were taken to prevent danger to the public, and could not escape from this liability by throwing the blame on the contractor employed by them to do the work. Secondly, because, following *The Utopia*, [1893] A. C. 492, they were under an obligation to protect other vessels from receiving injury from the sunken barge, as the employment of the contractor did not amount to an abandonment or transfer of the possession, management, and control of the wreck. THE SNARK - - - - - **C. A. 105**

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